Supreme Court, U.S.
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Docket No.: _____

**SUPREME COURT OF THE UNITED STATES**

**Yolanda Candelario-Ramos, et al.**

**Petitioners;**

**v.**

**Baxter Healthcare Corporation of Puerto Rico, Inc., et al.**

**Respondents.**

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On Petition for Writ of Certiorari to the
United States Court of Appeals for the First Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether Puerto Rico should not be considered a "location" for purposes of Title VII disparate impact analysis regarding "different terms, conditions or privileges of employment", because it is a unique geographic and ethnic entity populated almost exclusively by Puerto Ricans, who are a group protected by Title VII from being subjected to inferior terms, conditions and privileges of employment.

**LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGEMENT IS SOUGHT TO BE REVIEWED**

YOLANDA CANDELARIO RAMOS; MILDRED VÉLEZ CORTÉS; CARMEN P. MALDONADO SANABRIA; ROSA M. ROMÁN AMADOR; LYDIA SALAS RIVERA; NANCY E. VALENTÍN ABREU; GLORIA M. MADERA BERNIER; DOMINGO MACHADO TORRES (deceased - substituted by his surviving children: Domingo Machado Díaz, Carmen Socorro Machado Díaz, José Miguel Machado Díaz, Juan Carlos Machado Díaz, Carlos Alberto Machado Díaz and Luis Alberto Machado Díaz); PEDRO TORRES RAMÍREZ; ROSA RAMOS GARCÍA; HUMBERTO DEL VALLE CENTENO; ANA ABREU SANTOS; ELBA I. ROMERO RAMOS; AIDA S. ROSADO HERNÁNDEZ; MARTA L. RIVERA ALGARÍN; EDITH ARISTUD ÁLVAREZ; EFRAÍN MARTÍNEZ CRUZ; JOSÉ A. CARRASQUILLO ALVERIO; GLORIA N. HERNÁNDEZ RODRÍGUEZ; GLORIA E. HERNÁNDEZ GÓMEZ; IRIS L. OTERO MARTÍNEZ; LUZ A. ALBELO DÍAZ; HILDA R. ORTIZ COLLAZO; ELBA I. RIVERA ORTIZ; LUZ E. PÉREZ ROHENA; AIDA L. MANGUAL ROSARIO; NITZA M. DÍAZ GARCÍA; EMILIA CLASS ROSARIO; CARMEN M. JUST QUIÑONES; EFRAÍN SERRANO DOMENA; DAMARIS RIVERA DELGADO; MARGARITA CORDERO RODRÍGUEZ; LAURA RIVERA OSTOLAZA; SARA RIVERA COLÓN (deceased - substituted by her surviving father, Rafael Rivera Rivera); NORMA SILVA CRESPO; GLADYS E. GORDON ROMÁN; CARMELO MONTAÑEZ JIMÉNEZ; GLORIA E. ROHENA FRAGUADA; EDNA I. VÉLEZ RAMOS; ROSARIO PÉREZ NIEVES; MYRNA SOLÍS RÍOS; CARMEN M. GUZMÁN AGOSTO; SONIA I. JIMÉNEZ MARCANO; ESPERANZA MÉNDEZ ENCARNACIÓN; MIRNA L. MATOS FEBRES; ADA M. ARROYO QUILES;

ZAIDA C. ARBONA MARTÍNEZ; MARÍA SÁNCHEZ IGLESIAS; MARGARITA MORALES FERNÁNDEZ; HILDA SANTIAGO ANDÚJAR; DORIS N. OTERO DELGADO; JOSÉ A. SALDAÑA BIRRIEL; CARLOS M. VEGA MORALES; BENEDICTO PADILLA SERRANO; ELISA ROBLES PAGÁN; CONSUELO REYES; IRIS M. OCASIO GARCÍA; LUZ MARÍA VALENTÍN CORREA; NILSA VEGA FUENTES; MARÍA DE L. MERCED; BERENI BÁEZ SOTO; MARTA ARROYO CRUZ; NORMA IRIS RAMÍREZ FERNÁNDEZ; NEREIDA SANTIAGO SANTIAGO; CARMEN L. MARRERO TOLLENTS; HILDA E. RODRÍGUEZ RUIZ; VÍCTOR PÉREZ CALDERÓN; JUAN ANTONIO FARGAS RIVERA; JUANA A. RIVERA MORALES; CRUCITA FERNÁNDEZ RIVERA; NYDIA RODRÍGUEZ NAZARIO; CARMEN L. CARRERAS OLIVERAS; GLORIA E. FIGUEROA MONTALVO; NOEMÍ CONCEPCIÓN DELGADO; JUAN BETANCOURT ALEMÁN; LUIS A. ANDINO ANDINO; SALVADOR PÉREZ LUGO; FRANCISCO MONTAÑEZ FALCÓN; JULIÁN MATOS; LOIDA L. MONTAÑEZ DÍAZ; LUDIM GARCÍA DÍAZ; ABNER E. GARAYÚE VÁZQUEZ; JUAN A. GONZÁLEZ CORREA; GLORIA RODRÍGUEZ DE JESÚS; ALCIDES GARCÍA RIVERA; ROSA M. CARRASQUILLO VILLEGAS; JULIO A. SALGADO DÍAZ; GLORIA BARRETO GONZÁLEZ; CARLOS M. DÍAZ SOSA; CLARA QUIÑONES GARCÍA; HÉCTOR LUÍS CARRASQUILLO; MILDRED ORTIZ RAMÍREZ; ANÍBAL SANTOS TRUJILLO; LAURA GONZÁLEZ MELÉNDEZ; HAYDEE DEL VALLE MEDINA; MARICELIS MARÍN DÍAZ; RAMÓN MARTÍNEZ; JORGE L. GARCÍA COLÓN; HILDA QUIÑONES GONZÁLEZ ; RAMÓN LABORDE PÉREZ; MAXIMINO SERRANO; JUAN PAGÁN SANTOS; JOAQUÍN RAMÍREZ QUIÑONES; SAMUEL GUTIÉRREZ; JOSÉ E. TOSTE CASTRO; EDWIN SÁNCHEZ RODRÍGUEZ; MARTA MILLÁN CARRASQUILLO; RUTH

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RUBÉN REYES; CRUCITA GONZÁLEZ; ÁNGEL GARCÍA RIVERA; SANTA ANDINO MEDINA; MARÍA M. CORREA CALCAÑO; JUAN IRIZARRY; GLORIA E. SÁNCHEZ FALCÓN; JOSEFINA RODRÍGUEZ CASILLAS; ANA ROSA RODRÍGUEZ; CARLOS J. DE JESÚS BIRRIEL; MARÍA M. ROSARIO CABRERA; JUANITA AYALA; MARÍA D. MARTÍNEZ QUILES; CARMEN MARÍA ROMÁN; EDGARDO SALDAÑA; FRANCISCO RODRÍGUEZ REYES; JOSÉ BANCHS RIVERA; MARÍA M. CORREA; LUIS MATOS; MARÍA T. RIVERA; SABILDA RODRÍGUEZ; ERIC ROSARIO; LISSETTE VALCÁRCEL; and all others similarly situated;

Petitioners,

vs.

BAXTER HEALTHCARE CORPORATION OF PUERTO RICO, INC.; BAXTER INTERNATIONAL, INC.; BAXTER HEALTHCARE CORPORATION; BAXTER PHARMACY SERVICES CORPORATION; BAXTER SALES AND DISTRIBUTION CORP.; BAXTER HEALTHCARE CORPORATION OF PUERTO RICO PENSION PLAN; THE ADMINISTRATIVE COMMITTEE OF BAXTER INTERNATIONAL, INC. and its members JOHN DOE; JANE ROE; PETER SMITH and all other persons who are members but whose identities are currently unknown;

Respondents.-

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## OFFICIAL REPORTS OF OPINIONS AND ORDERS

The First Circuit Court of Appeals affirmed the judgment of the United States District Court for the District of Puerto Rico, granting summary judgment dismissing plaintiffs' claims. The First Circuit's opinion of March 8, 2004 is reported at 360 F.3d 53 (1st Cir., 2004) and is reprinted in the Appendix hereto at pp. 1-17. The District Court's opinion granting summary judgment for the respondents (Appendix pp. 17-60) is reported at 256 F. Supp. 2d 127 (D.C.P.R., 2003).

## JURISDICTIONAL STATEMENT

The Judgment of the United States Court of Appeals for the First Circuit sought to be reviewed was entered on March 8, 2004 and no rehearing was sought. This Court has jurisdiction to review on a writ of certiorari pursuant to 28 U.S.C. §2101(c ). Jurisdiction before the District Court was premised on 42 U.S.C. §§2000e et seq., 29 U.S.C. §§1100 et seq., 28 U.S.C. §§1331, 2201 and 2202; 29 U.S.C. §1132 (c) and 42 U.S.C. §12117. The Court of Appeals had jurisdiction pursuant 28 U.S.C. §1291, because the adjudication by the district court was a final judgment that disposed of all claims in this case.

## CONSTITUTIONAL CLAUSE AND STATUTES INVOLVED IN THE CASE

Territorial Clause of the Constitution of the United States; Article IV § 3, clause 2:

> The Congress shall have Power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States,....

Title VII of the Civil Rights Act: 42 U.S.C. § 2000e(i):

> (i) The term "state" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. §1331 et seq.]

Title VII of the Civil Rights Act: 42 U.S.C. § 2000e-2.

Due to the length of this statute, it is set out in the appendix.

## STATEMENT OF THE CASE

This is a civil action based on the race and/or national origin discrimination provision of Title VII of the Civil Rights Act, 42 U.S.C. Sec. 2000e et seq., challenging the decision of the defendants collectively referred to as 'Baxter' to provide inferior early retirement and retiree medical benefits as part of the pension plan of their Puerto Rico employees, who are nearly 100% Puerto Rican and Hispanic, to those same benefits provided to their overwhelmingly non-Puerto Rican and non-Hispanic employees in the continental United States. The original Complaint was presented on October 14, 1998 and an Amended Complaint was filed on February 8, 1999. The action originally set forth additional claims under ERISA (the Employee Retirement Income Security Act), 29 U.S.C. Sec. 1100 et seq. and under the Puerto Rico Civil Code. Neither of those claims form part of this appeal.

In the case before the United States District Court for the District of Puerto Rico (Hon. Raymond L. Acosta, Judge) and after a period of discovery, the defendants moved for summary judgment dismissing all claims. The plaintiffs opposed that request and after Reply and Sur Reply briefs, the matter was submitted to the consideration of the Court on or about January 4, 2001. On April 2, 2003 the Court granted the summary judgment motion of the defendants, dismissing all claims and entering the corresponding judgment on that date. See: Candelario-Ramos v. Baxter Healthcare of Puerto Rico, Inc.,256 F. Supp. 2d 127 (D.C.P.R., 2003). All plaintiffs appealed to the United States Court of Appeals for the First

Circuit, which affirmed the decision of the District Court in an opinion and judgment dated March 8, 2004. See: Candelario-Ramos v. Baxter Healthcare of Puerto Rico, Inc., 360 F.3d 53 (1st Cir., 2004).

## THE MATERIAL FACTS

### A. The History of the Baxter Pension Plans

As of January 1, 1986, American Hospital Supply Corporation (AHSC) merged with Baxter International, Inc. (then known as "Baxter Travenol Laboratories, Inc."). Both companies had pension plans for its employees at the time of the merger and Baxter Travenol had multiple manufacturing operations in Puerto Rico, including the plant in Carolina, Puerto Rico, where plaintiffs worked at the time. Thus, the corporate merger date of January 1, 1986, is the relevant date for purposes of this case.

Prior to the merger, AHSC had established the American Hospital Supply Corporation Retirement Plan, which, as a result of the corporate merger with Baxter Travenol Laboratories, Inc., changed its name to Baxter Travenol Laboratories, Inc. and Subsidiaries Pension Plan, effective as of January 1, 1986. The Plan was later amended to provide for participation by eligible employees of Baxter International, Inc. and its participating units and, effective June 9, 1988, changed its name to Baxter International, Inc. and Subsidiaries Pension Plan. Thus, the Baxter International, Inc. and Subsidiaries Pension Plan, known also as the **Domestic Plan**, was established on June 8, 1988 and since then has been sponsored by Baxter International, Inc.

Previously, on September 15, 1976, AHSC had established the American Hospital Supply Corporation Puerto

Rican Retirement Plan and effective January 1, 1980 Travenol Laboratories, Inc. had established the Travenol Pension Plan for Eligible Puerto Rico Employees. As a result of the corporate merger of AHSC with Baxter Travenol Laboratories, Inc., effective January 1, 1987 the Travenol Plan was merged into the AHSC Plan and changed its name to Travenol Laboratories, Inc. and Affiliates Puerto Rico Pension Plan, and this Plan was amended to provide for participation by eligible employees of Baxter Sales and its participating units. The sponsor of the Travenol Laboratories, Inc. and Affiliates Puerto Rico Pension Plan from January 1, 1987 until January 1, 1994 was Baxter Sales Corporation. Finally, on January 1, 1994, the Puerto Rico Plan changed its name to Baxter Healthcare Corporation of Puerto Rico Pension Plan and plan sponsorship was transferred to Baxter Healthcare Corporation of Puerto Rico.

By 1987, the **Domestic Plan** and the **Puerto Rican Plan** had the same formula and level of pension benefits for its participant employees, as well as the same early retirement provisions. Since then and at all times relevant to this case, both the Domestic and the Puerto Rican pension plans were administered and still are administered by the Administrative Committee appointed by the Compensation Committee of the Board of Directors of Baxter International, Inc.

B. The Domestic (U.S.) And Puerto Rico Pension Plans:

In January 1988 Baxter International, Inc. adopted the Corporate Human Resource Policy and Procedure Manual, which in its introduction, stated that the Manual:

> ... represents two years of corporate and division effort, and outlines **common procedures for the post-merger**

> **organization.*** / ***...We have deliberately pared back and **included only those policies and procedures intended for corporate-wide application**. Therefore, this document is not exhaustive. It is anticipated that divisions and facilities will establish their own 'local' manuals to cover issues not addressed here.(Emphasis added).

In the General Provisions of the Manual it was stated, as to the scope of policies, that:

> "[t]he terms and conditions of the policies/procedures contained in this manual **apply to all United States and Puerto Rican employees whose employment is administered by a domestic operating unit of the Company**, except as modified by law or division practice". (Emphasis added).

It is undisputed that the Carolina Baxter plant was administered by a domestic operating unit of Baxter and that all or almost all the employees in the Carolina plant, and in other Baxter Puerto Rico plants were Puerto Ricans.

Furthermore, the Manual states, under procedure no. 1.3-330, that the scope of the Employee Benefits Programs included "medical, dental, life, long-term disability, personal accident... as well as, sick pay, defined benefit and defined contribution retirement plans. (underscoring ours). On the other hand, the 1988 Corporate Human Resource Policy and Procedure Manual **applied to all United States and Puerto Rican employees whose employment was administered by a domestic operating unit of the Company.** Therefore, it established a centralized company policy of treating United States and Puerto Rican employees equally. This written policy, which conforms to the prevailing federal anti-

discrimination laws was not followed when improvements to the pension plans were considered shortly after the 1986 corporate merger, after a special Task Force studied the matter (1988-1989), and when the Early Retirement Point System ER/PS was adopted, effective January 1, 1990, for the Domestic Plan but not the Puerto Rico Plan.

C. Improvements to the Domestic Pension Plan Not Applied to the Puerto Rico Plan:

After the approval of the Corporate Human Resource Policy and Procedure Manual, in 1988 and 1989 a Task Force comprised of key Baxter management representatives was formed to review and study Baxter's retirement income program. The purpose of the study was to insure that Baxter's retirement income program continued to be up-to-date and in tune with the employees' needs for retirement income

As a result of the Baxter Task Force studies of 1988-89, the defendants adopted the policy that the purpose of the retirement income program was to fulfill the company's obligation for 'career' employees; that its objective was to be competitive, but not rich; fixed rather than variable and neutral towards early retirement; **and that there should be a single set of terms, conditions, or privileges of employment program for all operating units and classes of employees**". This policy recommendation echoed the 1988 Corporate Human Resource Policy and Procedure Manual, which applied to all United States and Puerto Rican employees whose employment was administered by a domestic operating unit of the Company.

The Domestic Plan, covering employees of Baxter in its U.S. mainland subsidiaries, permitted early retirement (i.e., before a worker reaches 65), but did not provide full retirement benefits to employees who retire early; until 1990, the

Domestic Plan mechanically reduced benefits in set amounts depending on how early an employee retired.

In 1990, Baxter revised the Domestic Plan to employ a point system for early retirement that, in addition to age, took account of how many years the worker had been at Baxter or a covered subsidiary. The net effect was to make the reduction less, and benefits greater, for early retiring workers who had served longer. This in turn made early retirement more attractive for long-serving workers covered by the Domestic Plan. Furthermore, in 1990 Baxter added the benefit of subsidized medical benefits for retirees who were covered by the Domestic Plan.

About 6,000 Baxter employees work in Puerto Rico, mostly for Baxter-PR. Employees of Baxter-PR are covered by the Puerto Rico Plan and this plan, like the Domestic Plan, is controlled by Baxter through its so-called Administrative Committee, the members of which are appointed by the Compensation Committee of Baxter's Board of Directors. Although the plans had differed in the past, just prior to 1990 the retirement terms of the Domestic and Puerto Rico plans were similar. However, when Baxter converted its Domestic Plan to the point system, it did not make a comparable adjustment in the Puerto Rico Plan.

The 1988-89 Task Force study was presumably completed before June, 1989, yet for a variety of reasons having to do with the alleged time it would take to translate the new benefits into Spanish, the need to perform 'discrimination testing' on the new plan and, eventually because the improvements were allegedly not needed in order to be competitive, in 1990 **it was decided not to extend the new early retirement or death benefit provisions to the Puerto Rico plan**. That decision became permanent and to this day the Puerto Rican employees in Puerto Rico, numbering over

6,000 (see: Candelario-Ramos v. Baxter Healthcare, 360 F.3d 53, 55-57 [1st Cir. 2004]) do not enjoy a point system which permit them the option of early retirement at full or nearly-full benefit levels and lack retiree medical benefits.

In 1993, 1995 and 1996 Baxter revisited the issue of whether to extend the ER/PS and medical retiree benefits to its Puerto Rico employees, but decided against such a change on each occasion, for reasons of 'competitiveness' and/or cost. This, despite the fact that the cost of retirement benefits for Puerto Rican employees represents a lower percentage of payroll than the cost of retirement for its predominately non-Puerto Rican employees under the Domestic Plan.

## ARGUMENT

### A. Introduction:

In Florida v. Long, 487 U.S. 223, 108 S.Ct. 2354 (1988), this Court considered the pension plan for employees of the State of Florida which "discriminated on the basis of sex in a manner prohibited by Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq.". The concurring and dissenting opinion by Justice Blackmun stated clearly that "it is undisputed that Title VII prohibits this kind of sex-based distinction in the provision of retirement benefits." Id. at U.S. 241, S.Ct. 2364. The present case also presents this High Court with an opportunity to consider a retirement plan which discriminates against a distinct minority -- Puerto Ricans.

Title VII states that it is unlawful 'to discriminate against any individual with respect '(a) ... to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

....' 42 U.S.C. §2000e-2(a)(1). It has also been established by the jurisprudence of this Court and codified by the 1991 Civil Rights Act that discrimination may take the form of a 'disparate impact' of employer policies or practices that appear neutral on their face but impact more severely and adversely on a protected group. See: 42 U.S.C. §2000e-(k).

**B. Disparate Impact:**

Claims of disparate impact discrimination under Title VII of the Civil Rights Act, 42 U.S.C. §2000e, et seq., have been recognized by this Court since 1971. These claims are described in this Court's analysis in Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), in which this Court explained that, "(t)he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." This Court went on to explain that "good intent or absence of discriminatory intent does not redeem employment procedures ... that operate as 'built-in headwinds' for minority groups...." Id., at U.S. 431 - 432, S.Ct. 854. Subsequently, this Court reiterated that, "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 987, 108 S.Ct. 2777, 2785 (1988).

Lower courts have applied the doctrine of Griggs and its progeny without requiring a showing of intent to discriminate. In the words of the Court of Appeals for the First Circuit:

> In the disparate impact milieu, the prima facie case consists of three elements: identification,

> impact and causation. First, the plaintiff must identify the challenged employment practice or policy and pinpoint the defendant's use of it. Second, the plaintiff must demonstrate a disparate impact on a group characteristic, such as race, that falls within the protective ambit Title VII. Third, the plaintiff must demonstrate a causal relationship between the practice and the disparate impact.

E.E.O.C. v. Steamships Clerks Union, 48 F.3d 594, 601 (1st Cir. 1995), *cert. denied*, 516 U.S. 814 (1995) (citations omitted).

**C. Disparate Impact of Baxter Policies on Puerto Ricans' Retirement Plan:**

Petitioners at bar satisfy all three elements of their prima facie case: identification, impact and causation. The retirement policy at bar, codified as the Puerto Rico Plan, clearly can be identified as an existing policy, it overwhelmingly impacts the Puerto Rican working population of Baxter far above and beyond any other protected class and it is the direct cause of significant financial losses, vis-a-vis the other overwhelmingly non-Puerto Rican Baxter workers.

As in E.E.O.C. v. Steamships, *supra*, at 604, this claim "nestles in a singularly compelling factual context". Furthermore, the entire decision-making process carried out by Baxter between 1989 and 1995 which resulted in inferior benefits for Puerto Ricans, applied neutral "business factors" to Puerto Rican employees, but did not apply the same "neutral considerations" to similarly-situated, overwhelmingly non-Puerto Rican employees in the continental United States. In

other words, when the Domestic Plan was improved, the motivation of Baxter was to stimulate early retirement and give all company employees fair treatment. But when deciding not to improve the Puerto Rican Plan, Baxter relied on different criteria – seemingly neutral but discriminatory in practice. Its reliance on cost and "competitiveness" criteria allowed Baxter to deny the same improvements (the early retirement point system and the medical retiree benefits) to their Puerto Rican employees because they were too costly or not necessary to remain "competitive".

From January 1, 1987 until January 1, 1994 the Puerto Rico Pension Plan was sponsored not by Baxter Healthcare of Puerto Rico, Inc., but by Baxter Sales Corporation. In other words, a distinct domestic unit of Baxter International was sponsoring the Puerto Rico Plan. There was no structural or policy reason to treat Puerto Rico differently. Furthermore, *the same Administrative Committee, made up of the same high-ranking Baxter officers* ***had the duty and responsibility of making decisions about the structure of both Pension Plans***. This single corporate entity, the Administrative Committee, administers only the two plans in question. How and why the Puerto Rico plan was ever singled out for inferior treatment was never adequately explained by the respondents, who failed to produce critical evidence and whose officers suffered from considerable amnesia during their depositions.

Defendants never refuted -- and therefore it is an established fact -- that the Corporate Human Resource Policy and Procedure Manual, adopted in 1988, applied to all United States and Puerto Rican employees whose employment was administered by a domestic operating unit of the Company. Thus, by 1988 there was established a centralized company policy of treating United States and Puerto Rican employees equally in terms of human resources. That policy was quickly

violated in the implementation of the ER/PS for the Domestic Plan and not for the Puerto Rico Plan. Based upon defendants-appellees' own policy statements and human resources definitions, it is evident that the review and study of Baxter's retirement income program should have included its continental U.S. and Puerto Rican employees, since they were both part of its domestic operating units.

**D. Puerto Ricans are a "minority" in terms of race and/or national origin:**

This High Court has stated that:

> In Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), the Court considered whether §5 of the Fourteenth Amendment gave Congress the power to enact § 4(e) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(e). Section 4(e) provides that no person educated in Puerto Rico may be denied the right to vote in any election for failure to read or write the English language. The Court held that Congress was empowered to enact § 4(e) as a remedy for discrimination against the Puerto Rican community. 384 U.S., at 652-653, 86 S.Ct., at 1724. Implicit in its holding was the Court's belief that Congress had the authority to find, and had found, that members of this minority group had suffered governmental discrimination.

Fullilove v. Klutznick, 448 U.S. 448, 500-501, 100 S.Ct. 2758, 2786 (1980).

It is beyond question that under Title VII law, Puerto

Ricans are, as a group, a protected class. Furthermore, this Court may take judicial notice that Puerto Rico is overwhelmingly populated by Puerto Ricans and that the Commonwealth of Puerto Rico is a "protected minority" enclave.

It is for that reason that the Court of Appeals decision below (Appendix 1), is all the more disturbing and problematic. Citing Title VII at subsection (h) of 42 U.S.C. §2000e-2, the Appeals Court stated that: "different treatment in different locations is permissible absent an intent to discriminate". That Appellate Court went on to state that: "[t]he subsection itself is not surprising. Location is often a proxy for differences in cost and other competitive circumstances...." Candelario Ramos v. Baxter Healthcare, 360 F.3d 53, 61-62 (1st Cir. 2004) (Appendix 1). What the Court neglected to note is that, when a "location" is synonymous with an ethnicity, it can be a proxy for discrimination, as well.

There is precious little appellate jurisprudence interpreting what a "location" is for purposes of allowing differences in terms and conditions of employment under §2000e-2(h) of Title 42 of the U.S. Code. , and none by this Court. But if we are to explore the significance of Puerto Rico as an ethnic or even a national enclave, the jurisprudence is revealing.

In Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 102 S.Ct. 3260 (1982), this Court recognized the right of Puerto Rico to sue agricultural employers in Virginia, in a *parens patriae* based action, on behalf of its citizens – migrant workers – who were facing job losses because of the favoritism of the defendants for foreign migrant workers. In doing so, the Court noted the unique situation in which Puerto Rico falls under the U.S. federal system and history of employment discrimination:

> This Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils. **This interest is peculiarly strong in the case of Puerto Rico simply because of the unfortunate fact that invidious discrimination frequently occurs along ethnic lines.** Puerto Rico's situation differs somewhat from the States in this regard--not in theory but in fact--simply because this country has for the most part been spared the evil of invidious discrimination based on state lines. (Emphasis ours)

Snapp & Son, Inc. v. Puerto Rico, *supra.*, at U.S. 609, S.Ct. 369.

In that decision, the Court implicitly recognized the obvious: that Puerto Rico is not a typical "state", that it is distinguished by being an island-nation with a idiosyncratic ethnic population, distinguishable from the majority population of the United States by race and/or national origin. And while Puerto Ricans form a minority protected population in the United States, which has merited the protection of laws such as Title VII and the Voting Rights Act, see, e.g. Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), in Puerto Rico Puerto Ricans form the overwhelming majority population. It flows logically, therefore, that any company policy which treats Puerto Rico differently because it is a "different location" also treats Puerto Ricans differently. Since the overriding purpose of Title VII is to level the economic and labor playing field throughout the United States jurisdictions (i.e., states, territories and possessions, as per 42 U.S.C.

2000e(I), which includes the 50 states, the District of Columbia, **Puerto Rico**, the Virgin Islands, American Samoa, Guam, wake Island, the canal Zone, and Outer Continental Shelf lands in its definition of "state"), it behooves this Court to disallow the application of a "location-based" facially neutral policy when it impacts exclusively on a protected race or national origin group.

This Court in Connecticut v. Teal, 457 U.S. 440, 102 S.Ct. 2525 (1972) noted that "[t]he legislative history of the 1972 amendments to Title VII ... demonstrates that Congress recognized and endorsed disparate impact analysis employed by the Court in Griggs", noting that "the Senate report not[ed] 'Employment discrimination as viewed today is a ... complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs". Id., at U.S. 447 n. 8. In the thirty years which have ensued, employment discrimination has continued to be a complex and pervasive phenomenon. Its eradication, through the application of legislation to combat this insidious problem, must be interpreted creatively and practically by the courts. Indeed, one commentator has explained the challenge facing courts when interpreting Title VII in the following terms:

> Title VII includes a concern for equal opportunity in addition to equal treatment, focusing on the harm to both groups and individuals.... The principle of liberal construction of this essential remedial civil rights statute must be applied to ensure that Title VII continues to be a serious response to a complex social problem. ... [This| includes a recognition that there is a national interest in

> assuring that members of our society are not injured in employment because of discrimination acts throughout society. Employment discrimination is not simply isolated acts of aberrant individuals; rather, it is part of the operation of a society that adversely affects racial and ethnic minorities and women.

Rossein, Merrick T., Employment Litigation, Law and Litigation, Thomson West, 2002, §1.3, p. 1-14.

The Court of Appeals for the First Circuit has failed its duty to heed this warning and has construed the subsection (h) of 42 U.S.C. §2000e- so restrictively as to allow that section to work in contravention with the overriding goals and mandate of Title VII, as applied to the Puerto Rican petitioners.

**E. Puerto Rico as a unique entity and ethnic enclave:**

This high Court has repeatedly stated that Puerto Rico is governed by Congress under the Territorial Clause of the United States Constitution, Art. IV, § 3, cl. 2, to which empowers Congress "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." Harris v. Rosario, 446 U.S. 651, 100 S.Ct. 1929 (1980) (per curiam). This Court has stated that Congress may treat Puerto Rico differently from States so long as there is a rational basis for its actions. Id., at U.S. 651-652, S.Ct. 1929; see also: Califano v. Torres, 435 U.S. 1, 98 S.Ct. 906, 55 L.Ed.2d 65 (1978) (per curiam ).

Certainly, regarding Title VII, Congress chose to treat Puerto Rico, and all its other territories, as states, indicating congressional understanding of the wide expanse of the problem of employment discrimination and signaling its determination to

combat such discrimination in all jurisdictions under the U.S. flag. However, the Court has not come to terms with the need to recognize the uniqueness of Puerto Rico in the application of Title VII.

Puerto Rico was invaded by the United States in 1898 during the Spanish-American War, when it was an autonomous colony of Spain. As a result of the defeat of Spain, Puerto Rico was ceded to the United States, along with other former Spanish colonies, pursuant to the Treaty of Paris. After suffering through a military occupation and government, Puerto Rico had a series of colonial governments, with increasing measures of self-government, but with control still vested in the Territorial Clause of the Constitution, as first recognized by this Court in De Lima v. Bidwell, 182 U.S. 1 (1901) and later decisions, culminating in Balzac v. Porto Rico (sic), where the doctrine of the cases which came to be known as the *insular cases* culminated with a unanimous endorsement of the Court.

As of 1952 Puerto Rico has been a "Commonwealth" but one very different from Massachusetts or Virginia. Puerto Rico continues to be subject to the Territorial Clause powers of the Congress. The statehood movement, which has lobbied the Congress for the last two decades, has met a Congress indifferent or even hostile to its position, based largely on the understanding that Puerto Rico has the characteristics of nationhood: a unique culture, a dominant language different from that of the 50 states, and an ethnicity which is separate and distinct from other under the U.S. flag. Indeed, international human rights observers have frequently included Puerto Rico as a people reduced to a "non-dominant or colonial condition" - terminology used by the Working Group on Indigenous Peoples in their definition of indigenous populations - including "Basques, Kurds, Abkazians, Bretons, Chechens, Tibetans, Timorese, *Puerto Ricans*, Northern Irish, Tamils [and]

Palestinians".[1]

This Court has resisted defining the Puerto Rico political status as colonial, preferring to refer to it as a territory.[2] However, implicit in this separateness is a recognition of the uniqueness of the Puerto Rican population --American citizens by designation of Congress and beneficiaries of the protections of Title VII by similar congressional decision. What has been lacking has been a recognition that this uniqueness requires unique protection by the federal powers – including this High Court – which still hold ultimate authority over Puerto Rico.[3] In the context of this case, this Court must not allow companies such as Baxter to subvert the protections of Title VII by applying a "neutral" policy of cost and competitiveness analyses only to the "location" of Puerto Rico, where those who are prejudiced by the company's conclusion that it did not need to place retirement benefits on par with the remainder of the U.S. jurisdictions in which it operates, are exclusively Puerto Ricans.

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1 Jeff J. Corntassel & Tomas Hopkins Primeau, "Indigenous 'Sovereignty' and International law: Revised Strategies for Pursuing 'Self-Determination', 17 Human Rights Quarterly 343 (1995), cited in Fermín Arraiza-Navas, "Puerto Rico in the Decolonization Decade: 1990-2000", Revista del Colegio de Abogados de Puerto Rico, Vol. 58, Nos. 1-2, 1997.

2 See, generally, Carlos I. Gorrín-Peralta, "Historical Analysis of the Insular Cases: Colonial Constitutionalism Revisited", Revista del Colegio de Abogados de Puerto Rico, Vol. 56, No. 1, 1995.

3 Contrast, for example, the lack of protection for Puerto Ricans *living in the 'location' of Puerto Rico* with the protection granted explicitly by Title VII to Native Americans, who are exempt from the strictures of this law in terms of hiring practices on their reservations. 42 U.S.C. 2000e-2(I) This distinction from the case of Puerto Rico is untenable and defies logic and justice.

**F. Conclusion:**

The letter and spirit of Title VII, when applied to the unique circumstances of Puerto Rico, require that this Court to disallow the application of a "location-based" facially neutral policy when it impacts exclusively on a protected race or national origin group. In this specific case, the improvements made to Baxter's Domestic Pension Plan should have included its continental U.S. and Puerto Rican employees – including those residing and working in Puerto Rico, since they were part of its domestic operating units of the company and, more importantly, workers protected from discrimination in the terms, conditions and benefits of their employment based on being Puerto Rican.

**WHEREFORE**, it is respectfully requested that this Honorable Court GRANT this Petition for Writ of Certiorari and SET this case for full briefing and consideration of the question presented.

Respectfully submitted, in San Juan, Puerto Rico, this 6th day of June, 2004.

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## APPENDIX

1. Opinion and Judgment of the Court of Appeals for the First Circuit in Candelario-Ramos v. Baxter Healthcare of Puerto Rico, Inc., 360 F.3d 53 (1st Cir., 2004).

United States Court of Appeals
For the First Circuit

No. 03-1774

YOLANDA CANDELARIO-RAMOS, ET AL.,

Plaintiffs, Appellants,

v.

BAXTER HEALTHCARE CORPORATION OF PUERTO RICO, INC., ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Raymond L. Acosta, Senior U.S. District Judge]

Before Boudin, Chief Judge, Torruella and Howard, Circuit Judges.

Charles S. Hey-Maestre with whom Luis Amauri Suárez-Zayas was on brief for appellants.

Sari M. Alamuddin with whom Jeffrey K. Ross, Christopher A. Weals and Seyfarth Shaw LLP were on brief for appellees.

March 8, 2004

BOUDIN, Chief Judge. Plaintiffs, employees of Baxter Healthcare Corporation of Puerto Rico ("Baxter-PR"), appeal from the district court's decision granting summary judgment to defendants on plaintiffs' Title VII claim. Ramos v. Baxter Healthcare Corp. of Puerto Rico, Inc., 256 F. Supp. 2d 127, 150 (D.P.R. 2003). That claim charged Baxter-PR, and its U.S. parent--Baxter, International, Inc. ("Baxter")--with discriminating based on race and national origin in setting the terms of plaintiffs' pension plan. The background facts are undisputed.

Baxter is a major manufacturer of health care products. Together with its numerous subsidiaries, it employs about 45,000 people worldwide. It maintains a pension plan, called the Domestic Plan, covering employees of Baxter and many but not all of its U.S. mainland subsidiaries. The Domestic Plan permits early retirement (i.e., before a worker reaches 65), but does not provide full retirement benefits to employees who retire early; until 1990, the Domestic Plan mechanically reduced benefits in set amounts depending on how early an employee retired.

In 1990, Baxter revised the Domestic Plan to employ a point system for early retirement that, in addition to age, took account of how many years the worker had been at Baxter or a covered

subsidiary. The net effect was to make the reduction less, and benefits greater, for early retiring workers who had served longer. This in turn made early retirement more attractive for long-serving workers covered by the Domestic Plan. Baxter says some workers are better off with the change and others worse off.

About 6,000 Baxter employees work in Puerto Rico, mostly for Baxter-PR. Employees of Baxter-PR are covered by the so-called Puerto Rico Plan, but this plan, like the Domestic Plan, is controlled by Baxter through its so-called Administrative Committee, the members of which are appointed by the Compensation Committee of Baxter's Board of Directors. Although the plans had differed in the past, just prior to 1990 the retirement terms of the Domestic and Puerto Rico plans were similar. (1) However, when Baxter converted its Domestic Plan to the point system, it did not make a comparable adjustment in the Puerto Rico Plan.

In 1995 Baxter began the closing of a major plant in Carolina, Puerto Rico. A number of Baxter-PR employees, most of whom worked at the plant, responded in 1998 by filing the present law suit in the federal district court in Puerto Rico. The defendants were their employer, Baxter itself, two other Baxter subsidiaries doing business in Puerto Rico, and the members of the Baxter committee that managed both plans. A principal claim, and the only one pursued on appeal, is that the different treatment of early retirees under the respective plans violates Title VII. 42 U.S.C. § 2000e-2(a) (2000).

On motion for summary judgment, the district court ruled in favor of the defendants. Ramos, 256 F. Supp. 2d at 150. Although class certification had been sought, that issue was not

discussed and neither side complains. In a nutshell, the district court analyzed the evidence adduced on the Title VII claim and concluded that there was no evidence of intentional discrimination sufficient to warrant a trial. After a brief analysis, the court also rejected a claim of disparate impact discrimination. This appeal followed. (2)

Our review of the granting of a motion for summary judgment is de novo, drawing reasonable inferences in favor of the non-moving party, here the plaintiffs. Zapata-Matos v. Reckitt & Colman, Inc., 277 F.3d 40, 42 (1st Cir. 2002). Title VII, so far as pertinent, says an employer may not "discriminate" in compensation or terms of employment based, inter alia, on "race" or "national origin." § 2000e-2(a)(1). Baxter assumes without argument that intentional discrimination in pension plan terms against Puerto Ricans would violate Title VII.

Baxter is less ready to concede that the Domestic Plan is more favorable to employees than is the Puerto Rico Plan. It suggests that some employees are better off under the latter than the former. But its documents also show that it would have cost Baxter-PR a substantial sum to switch over to the new point system. So we will also assume arguendo (it does not alter the outcome) that it would be "discrimination" under Title VII to withhold the point system if the motive in whole or in part was hostility to Puerto Ricans. See Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 18-20 (1st Cir. 1999).

This brings us to the evidence of motive. Typically at this stage Title VII cases undertake a relentless survey of McDonell Douglas Corp. v. Green, 411 U.S. 792 (1973), and its main sequels, (3) but we can be spared this exercise. Assuming the plaintiffs made out the so-called prima facie case of

discrimination, see id. at 802--a point which Baxter disputes on the ground that not all of its mainland subsidiaries enjoy access to the point system--the defendants provided a facially plausible reason for not adopting the point system in Puerto Rico. The reasons were the added cost, the financial climate, and the view that the benefits offered by Baxter-PR were already competitive in Puerto Rico. See Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 6 (1st Cir. 2000); Zapata-Matos, 277 F.3d at 45.

Whether the evidence in this case created a jury issue on improper motive depends simply on analyzing the sworn testimony and documents presented on summary judgment and deciding what commonsense inferences they permit. If the plaintiffs lack direct evidence of animus, it may yet be possible to infer it circumstantially, depending on the facts; and if the defendants gave explanations that a jury could find to be false, this will count against them in the mix of inferences. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148-49 (2000); Thomas v. Eastman Kodak Co., 183 F.3d 38, 57 (1st Cir. 1999), cert. denied, 528 U.S. 1161 (2000).

Here no direct evidence exists of discriminatory intent--for example, there are no statements by Baxter management disparaging Puerto Ricans. Instead, plaintiffs concentrate their attack on the alleged inadequacy of Baxter's reasons for its differential treatment, on supposed discrepancies in its explanations, on its failure to produce documents, and on the inference that weak explanations are given to cover wicked motives. We set forth the sequence of events within Baxter in more detail and then consider the plaintiffs' arguments.

In 1988 and 1989 a Baxter task force reporting to the Board's

Compensation Committee undertook a review of Baxter's retirement program. According to the affidavit of a consultant, Gregory Hansen, who participated in the exercise, the decision to adopt the point system was made because the prior system created a strong disincentive for long serving employees to retire early. The politely unspoken inference is that Baxter wanted to encourage retirements of employees whose long service also meant high salaries.

In all events, plaintiffs do not challenge the explanation but only the failure to extend the same courtesy to employees of Baxter-PR. According to Hansen, by the time of a June 6, 1989, meeting of the task force, Baxter had decided to adopt the point system for the Domestic Plan as of January 1, 1990. When Hansen asked in the meeting whether the system would also be adopted in Puerto Rico, he was told that there might be a delay because of translation and related problems but that his firm should develop an estimate of the increased costs if the Puerto Rico Plan were to be similarly amended.

Other Baxter documents created at the same time suggest that Baxter was inclined to delay any such change in Puerto Rico until, among other things, it could complete a survey of overall benefits and compensation for its Puerto Rico operations. An affidavit from Mary Barker, a former Vice President of Benefits Management at Baxter, says that Baxter's compensation at different locations around the world differs depending upon "cost and competitive market conditions" and that the benefits package in Puerto Rico differs in various respects from those in other locations--some favoring Puerto Rico and some not.

In all events, later documents and testimony covering the 1990-1993 period show that Baxter created a new task force on

compensation early in 1993 to review benefits for Puerto Rico employees, and it conducted a study during the year. The study concluded that Baxter's "base salaries in Puerto Rico [were] 93% of the comparator group" and that overall Baxter's "benefits [were] generally competitive." In addition to the study, the task force also priced various enhancements for the Puerto Rico Plan--the point system was estimated to cost $900,000 per year--but there was "no consensus" among task force members on the question whether to adopt the point system.

In her deposition, Mary Barker said that various task force proposals, including the possibility of switching to the point system, were considered by senior Baxter management in October 1993. She said that there were cost concerns about new benefits in Puerto Rico and that at the time business conditions were unfavorable: Baxter's stock price was not doing well and tax-law changes then under review were thought to have potentially adverse effects on Puerto Rico operations. Among the objectives of senior management was to be sure that Puerto Rico costs remained competitive with Baxter's other worldwide operations. Ultimately, the decision was made not to adopt the point system for the Puerto Rico Plan, although other benefits changes were adopted.

The following year Baxter created an advisory counsel made up of representatives of its business units operating in Puerto Rico. This council eventually recommended that Baxter adopt for Puerto Rico units the point system, or a new 401(k) type contribution plan, or both; but Baxter decided not to do either, partly because of cost and partly because a separate 1995 study of its competitors in Puerto Rico showed that Baxter's pension benefits were well above the median. The same study showed

that Baxter's overall compensation package in Puerto Rico was below the median but this was, importantly, because Baxter did not offer the 401(k) type plan. Baxter did adopt such a plan for Puerto Rico in 1998.

Thus far there is nothing ominous in the story. About the most one could say--if this were all--is that Baxter, although sometimes following a uniform approach, appears for the most part to have varied its compensation regimes based on location and that Baxter considered adopting the point system in Puerto Rico, but concluded that it would be costly and was not needed to retain its employees. This shows that Baxter's management were profit-oriented capitalists, but not that they intentionally discriminated against Puerto Ricans within the meaning of Title VII.

In attacking this scenario and the district court's grant of summary judgment, plaintiffs' very able brief presents four main themes: that the failure to extend the point system to Puerto Rico contradicted a settled Baxter policy of uniformity as to benefits; that allegedly inconsistent statements were provided as to certain events; that there are suspicious failures by Baxter to produce documents or remember events; and that the district court relied on factual propositions that were fairly controverted and drew inferences against plaintiffs.

Plaintiffs' broadest position, and the foundation for most of their other arguments, is that Baxter had adopted prior to 1990 a general policy of uniformity of treatment in compensation for all employees of Baxter enterprises whether located on the mainland or in Puerto Rico. From this it follows, according to the plaintiffs, that purported cost concerns about extending the point system to Puerto Rico were pretextual and that a

reasonable inference from this deceit is an illicit motive.

Whatever the logic, the premise is wrong. It is based mainly on statements in a Corporate Human Resource Policy and Procedure Manual adopted in 1988 described as having "corporate-wide application." The manual says that "[u]nless otherwise approved," each Baxter unit is to "participate" in employee benefit programs including retirement programs designed by Corporate Benefits. Plaintiffs take this as a commitment to uniform compensation at all locations, making the discrepant treatment of Puerto Rico a suspicious deviation.

But the manual, apart from other routine disclaimers, says that uniform treatment is provided "unless otherwise approved." The evidence is clear that Baxter did in certain respects vary benefits by location both before and after 1990; and the history of the Puerto Rico operations vis à vis mainland operations is a tangled one. The claim that uniformity was a strict policy from which this case was a unique, suspicious deviation is wrong on the facts and not one that a reasonable jury could accept.

Plaintiffs' second argument is narrower and comes closest to making out a conventional case against summary judgment. Focusing primarily on the 1990 decision itself, plaintiffs point to one statement, already mentioned, that the extension of the point system to Puerto Rico was being delayed for six months or a year because of translation and related problems; and, charging "pretext," plaintiffs contrast this with the indefinite delays that followed and the concern with cost that was given as the reason for inaction.

This is a fair argument--a false reason coupled with other facts

can suggest an illicit real reason, Zapata-Matos, 277 F.3d at 45--but context here greatly blunts its force. The focus of the 1988-89 task force was on the Domestic Plan, and Hansen in a memorandum discussing the June 6, 1989, implementation meeting says that he "brought up the subject of the Puerto Rico plan and whether comparable changes will be made." He then says that Baxter said it "might want to at least delay 6 months and maybe a year" because of translation and related issues. (4)

Then, the formal minutes of the June 28, 1989, task force meeting record that Hansen again raised the issue and got the following reply:

Judy Coffey-Hedquist explained that, from a time perspective, it would not be possible to implement and communicate changes to the Puerto Rico Plan by January 1, 1990.

Herb Walker pointed out that it would also be prudent to defer implementation so that the results of several employee surveys on compensation and benefits currently distributed to Puerto Rico employees become available.

A memorandum by Hansen the next day says: "A survey is being conducted on compensation and benefits in Puerto Rico. It was decided not to extend the new early retirement or death benefit provisions to the Puerto Rico plan currently."

In other words, from the outset, cost and competitiveness were at issue. No juror could reasonably draw from this supposed "discrepancy" an inference that Baxter lied about its reasons for not extending the point system to Puerto Rico and must have harbored animus toward Puerto Ricans. Even plaintiffs'

foundational premise--Baxter's supposed policy of uniformity--is undercut by the documents.

Next, the plaintiffs say that Baxter failed to produce documents to back up its story and that the failures undercut or cast doubt on the reasons given by Baxter for its actions. In particular, plaintiffs complain about the absence of the formal minutes of the June 6, 1989, meeting of the task force; any formal study underpinning the decision to adopt the points system for the Domestic Plan; any cost or competitive study leading to the refusal to do so for Puerto Rico; and the results of any Puerto Rico surveys on compensation and benefits.

Starting with the most specific complaint--the absence of June 6, 1989, task force minutes--there is simply no indication that such minutes ever existed, or if they did, were deliberately withheld. The task force appears to have been a working group, not a formal administrative unit like the Administrative Committee that ran the pension plans (all of whose minutes were produced). Baxter did produce an agenda for the June 6, 1989, task force meeting and Hansen's summary, and, although Baxter did produce minutes for at least one other task force meeting, nothing suggests that any further documentary record of the June 6, 1989, meeting exists.

The lack of any formal study of adopting the point system as part of the Domestic Plan may or may not be surprising, but, again, there is no indication that Baxter deliberately withheld any documents in its possession from the plaintiffs. The point system was one of a number of issues considered by the task force; and anyone familiar with corporate decision-making culture would not be surprised that the remnants would be nothing more than agendas, scattered references in summaries

and minutes, and a few memories secured by depositions.

Plaintiffs also point out that a stated reason for deferring the point system for Puerto Rico was to await alleged surveys of compensation and benefits being conducted in Puerto Rico. Yet the March 8, 1991, minutes of the Administrative Committee suggest that surveys and other studies were underway, and there is no dispute that by 1993 Baxter had surveyed employees in Puerto Rico and also obtained a study of benefits from comparable companies in Puerto Rico--information made available to the plaintiffs. (5)

The last "missing" item is any document formally explaining the decision not to extend the point system to Puerto Rico. But, as with many cases of inaction, there is no reason to think that any such formal document existed. What the documents taken together show is an initial decision to defer the issue for study, a later determination that the cost of extension would be considerable, and at least two benefits studies indicating that Baxter-PR's retirement benefits matched those of other companies in Puerto Rico.

This brings us to plaintiffs' final claim, a general--but then elaborately documented--claim that the district court relied on facts not proved, ignored evidence favorable to plaintiffs, and drew inferences in favor of defendants. An introductory table provides one to two dozen examples (depending on how one counts) together with record cites and then refines or restates a number of them in text. This is certainly a helpful way to present the material.

The difficulty is that on close examination the examples given tend to dissolve. The first, and most important, group reflect

plaintiffs' main premise that from the outset Baxter intended a single retirement regime embracing the mainland and Puerto Rico, deviating at the last minute for pretextual reasons. But we have already explained why the plaintiffs' premise is faulty, resting as it does on a misreading of the manual and an oversimplification of Baxter's history and practice as to uniformity. Several other criticisms rest on the absence of documents (e.g., surveys) and the alleged contradictions in reasons given by Baxter in June 1989--both points already discussed. And some of the examples are just argument: e.g., that Christmas bonuses were admittedly paid in Puerto Rico and not in the United States but were required in Puerto Rico by statute.

In the end plaintiffs' collection of examples fails because whatever the quibbles, there is simply no evidence that Baxter management acted out of animus to Puerto Ricans. Plaintiffs say in their table that this ignores evidence that a Baxter-PR official was concerned about the fairness of the decision and that Mary Barker was concerned about employee reaction. But neither comment provides a basis for an inference that Baxter management itself was concerned about anything beyond saving money. (6)

Even with reasonable inferences drawn in plaintiffs' favor, the district court correctly held that there was no evidence of animus--and that means that the discriminatory treatment claim fails. What is left is that part of the evidence that shows that employees of Baxter-PR--most and perhaps almost all of whom are Puerto Rican--were treated differently than Baxter's mainland employees, who we will assume are mostly not Puerto Rican. This brings us to plaintiffs' alternative disparate impact theory of violation.

Plaintiffs claim that regardless of intent or lack of racial discrimination, Baxter's dual plan approach has the impermissible effect of disfavoring Puerto Ricans. See Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (disparate impact prohibits "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity"); see generally Griggs v. Duke Power Co., 401 U.S. 424 (1971).

It is true that disparate impact liability can be imposed regardless of whether an employer possesses an intent to discriminate, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988), but Title VII also says:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system . . . or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(h) (2000) (emphasis added). In other words, different treatment in different locations is permissible absent an intent to discriminate.

What legislative history there is tends to confirm this view, see 110 Cong. Rec. 12,723 (1964) (statement of Sen. Humphrey); and the few appellate cases interpreting the "different locations" language of § 2000e-2(h) also appear to support this reading.

See Russell v. Am. Tobacco Co., 528 F.2d 357, 362-63 (4th Cir. 1975), cert. denied, 425 U.S. 935 (1976) ("If . . . Leaf and Branch are different locations, and if the differences in treatment of workers at the different locations are not due to an intention to discriminate, the company's refusal to allow Leaf employees to transfer on the basis of company-wide seniority would not violate the Act.").

In addition, there are numerous cases, including Supreme Court decisions, construing the companion "bona fide seniority system" language of § 2000e-2(h)--those cases hold that an employer who provides different levels of compensation for employees pursuant to a bona fide seniority system cannot be held liable under a disparate impact theory--plaintiffs must prove an intent to discriminate. E.g., Pullman-Standard v. Swint, 456 U.S. 273, 289 (1982); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 82 (1977); Int'l Bhd. of Teamsters, 431 U.S. at 348-56. The two provisions of subsection 2(h) can fairly be read together.

The subsection itself is not surprising. Location is often a proxy for differences in cost and other competitive circumstances; and while Congress could have made those circumstances a separate defense, the difficulties of showing that a difference in pay precisely correlated with a difference in cost would be formidable. Cf. Texaco Inc. v. Hasbrouck, 496 U.S. 543, 561 n.18 (1990) (discussing the difficulties of establishing the cost justification defense under the Robinson-Patman Act). In effect, different locations are simply a safe harbor where there is no intentional discrimination.

Affirmed.

1. The Puerto Rico plan derives from the consolidation with Baxter's enterprises in 1985 of another major company having Puerto Rico facilities; the benefits in Puerto Rico at the outset were well below mainland standards but were raised after the initial consolidation.

2. The plaintiffs also challenged Baxter's decision not to extend subsidized retiree medical and life insurance benefits, both of which are offered under the Domestic Plan, to the Puerto Rico Plan. However, both parties seem to agree on appeal that resolution of the issues surrounding the point system necessarily disposes of the same issues with regard to the medical and life insurance benefits. See Ramos, 256 F. Supp. 2d at 133.

3. E.g., Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Reeves v. Sanderson Plumbing Prods., 530 U.S. 133 (2000).

4. There was also an oblique reference in this report to concerns about discrimination, but comparable references in other documents indicate that this concern involved the risk that adoption of the points system in Puerto Rico could have the effect of impermissibly favoring highly compensated employees. See 26 U.S.C. § 401(a)(4) (2000); Ramos, 256 F. Supp. 2d at 138.

5. To bolster their argument, plaintiffs produced the affidavits of three long-term Baxter-PR employees, all plaintiffs in this case, who say that they were unaware of any employment surveys conducted between 1989 and 1993. However, as the district court pointed out, "the fact that plaintiffs in this particular action did not personally know of any such surveys

nor [were] advised of the results is not indicative that none were carried out." Ramos, 256 F. Supp. 2d at 140.

6. Plaintiffs also argue that the district court erred in refusing to consider the affidavit of one Gilda Nevin, a retired Baxter employee who transferred from Puerto Rico to Illinois in the early 1980s. Nevin said that her new colleagues in Illinois treated her poorly because she was Puerto Rican and that Baxter unfairly refused to credit her years of service in Puerto Rico toward her pension benefits. Nevin stopped working for Baxter in 1987, before implementation of the points system was even contemplated, and the district court did not abuse its discretion in ruling that her affidavit had little bearing on the issues in this case. See Bradley v. Work, 154 F.3d 704, 708-09 (7th Cir. 1998).

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2. Opinion and Order of the United States District Court for the District of Puerto Rico in Candelario-Ramos v. Baxter Healthcare of Puerto Rico, Inc., 256 F. Supp. 2d 127 (D.C.P.R., 2003).

256 F.Supp.2d 127

91 Fair Empl.Prac.Cas. (BNA) 815,

30 Employee Benefits Cas. 2731

United States District Court.
D. Puerto Rico.

Yolanda Candelario RAMOS, et al., Plaintiffs,

v.

BAXTER HEALTHCARE CORPORATION OF PUERTO RICO, INC., et al., Defendants.

No. CIV. 98-2146(RLA).

April 2, 2003.

Defendants have moved the court to enter summary judgment in their favor and to dismiss plaintiffs' claims of alleged national origin discrimination as well as those asserting breach of fiduciary duties under ERISA and under the Puerto Rico Civil Code.

I. UNCONTESTED FACTS

The court finds that the following facts, material to the issues presented in the outstanding summary judgment request, are uncontested.

BAXTER INTERNATIONAL, INC. ("BAXTER") is a U.S. Corporation which manufactures and distributes health care products on a global basis. BAXTER has subsidiaries and facilities in the United States as well as around the world. Including its subsidiaries, BAXTER employs approximately

45,000 employees world-wide.

One of BAXTER's subsidiaries, through intermediate corporations, is BAXTER-PR. BAXTER P.R. transacts businesses in Puerto Rico and is the employer of most of BAXTER's approximately 6,000 employees in Puerto Rico.

BAXTER and its subsidiaries provide their employees an opportunity to participate in certain defined benefit pension plans.

The Domestic Plan is the primary domestic defined benefit plan and covers the employees of many, but not all, BAXTER subsidiaries in the continental United States. (FN1)

BAXTER-PR is one of the BAXTER subsidiaries which has not adopted the Domestic Plan. Instead, BAXTER-PR has a comparable defined benefit pension plan for its employees, i.e., the Puerto Rico Plan. The Puerto Rico Plan, like the Domestic Plan, provides benefits for employees who retire early.

BAXTER and its subsidiaries in the United States and around the world provide different compensation and benefit programs to their employees. However, only the Domestic and Puerto Rico Plans are subject to ERISA.

The Puerto Rico Plan and its predecessors historically have had different provision formulas and employee "payouts" than the Domestic Plan.

In 1987 the Puerto Rico Plan was modified so as to match the Domestic Plan general retirement "payout".

As of 1987 both the Domestic and Puerto Rico Plans had the same formula and level of pension benefits for participating employees as well as the same early retirement provisions.

In 1990 the Domestic Plan early retirement formula changed to a point system ("ER/PS") but the Puerto Rico Plan did not. Instead, the early retirement benefit formula in the Puerto Rico Plan has remained the same as the pre-1990Domestic Plan.

The Domestic Plan, like many ERISA pension plans, has an early retirement provision for employees retiring before age 65.

The formula for calculating early retirement benefits applicable to the Puerto Rico Plan as well as to the pre-1990 Domestic Plan operated as follows. An employee with ten years of service who retired between age 55 and 65 received a subsidized early retirement pension benefit, reduced at the rate of 3% of normal benefits for each year of retirement before age 65. Accordingly, an employee retiring at age 55 received 70% of his or her normal retirement benefit (3% per year X 10 years = 30% reduction). If an employee left before age 55 (with ten years of service), there was a severe reduction, or "cliff", in early retirement benefits to 29% of the normal retirement benefit--the actuarial equivalent of full benefits without any subsidy. Even then, an employee retiring before age 55 had to wait until age 55 to even begin receiving the 29% actuarial equivalent. This cliff discouraged employees from leaving before age 55.

Pursuant to the ER/PS implemented in 1990 the method

by which early retirement pension benefits were calculated in the Domestic Plan was determined based on the total of the employee's age and years of credited service. Normally, if an employee retires before age 55, the monthly benefit is reduced on an actuarial basis to reflect the fact that the benefit will be paid out over a longer period of time. Under the ER/PS, an employee receives a subsidized benefit based upon the number of points (age plus years of credited service) accumulated. The early retirement subsidy increases with the number of points, thus, an employee retiring at age 55 with 65 points would receive 29% of the full retirement benefit, while an employee retiring at age 55 with 85 points would receive 100% of the retirement benefit.

The primary reason for the change to the point system was to neutralize early retirement pension benefits as a factor in an employee's retirement decision-making. BAXTER, at that time, was considering a number of workforce reductions. By removing the previous cliff for employees retiring before age 55, BAXTER allowed long-term employees to retire before age 55 when they wanted to, rather than forcing them to keep working in order to earn the subsidized retirement benefits.

Ever since the Domestic Plan adopted a point system formula for determining early retirement benefits in 1990, local BAXTER management in Puerto Rico has made a series of proposals to change the Puerto Rico Plan formula to a point system. These proposals were but one part of regular proposals to change and/or increase many different types of benefits. BAXTER has continually decided not to adopt the point system in Puerto Rico.

In 1998 BAXTER decided to implement a defined

contribution pension plan in Puerto Rico.

In October 1995 BAXTER announced the closing of the Carolina plant, one of its largest plants in Puerto Rico, because it had excess production capacity in Puerto Rico and needed to reduce costs and improve competitiveness. The closing was conducted in stages over several years beginning in January 1996 and ending in December 1998.

During this time, a number of the employees at the Carolina facility sought to enhance their early retirement benefits under the Puerto Rico Plan by writing to BAXTER urging it to change to a point system.

On February 11, 1997 BAXTER sent a letter to certain of these BAXTER-PR employees under the signature of MIKE TUCKER, Senior Vice President of Human Resources, explaining the reasons why the proposal to change the Puerto Rico Plan to a point system had been rejected.

## II. THE COMPLAINT

A number of BAXTER-PR employees who worked at the Carolina plant filed the instant suit alleging national origin discrimination and breach of fiduciary duties as a result of BAXTER's decision, since **1990**, not to institute a point system in the early retirement provision of the **Puerto Rico Plan**, as was done in the **Domestic Plan**.

The suit also makes the same legal claims concerning the parallel, subsidized retiree health and life insurance benefits that apply to employees covered by the **Domestic Plan**, but do not apply to employees covered by the Puerto Rico Plan. Since

both claims involve the same basic issues and in order to avoid confusion we shall address the ER/PS arguments only bearing in mind the result will apply to the health and life benefits claims as well.

## III. SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure sets forth the standard for ruling on summary judgment motions providing that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See, Sands v. Ridefilm Corp., 212 F.3d 657, 660-61 (1st Cir.2000). The party seeking summary judgment must first demonstrate the absence of a genuine issue of material fact in the record. DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir.1997). A genuine issue exists if there is sufficient evidence supporting the claimed factual disputes to require a trial since a reasonable factfinder could resolve the issue in favor of either party. Rogan v. City of Boston, 267 F.3d 24, 27 (1st Cir. 2001); Morris v. Gov't Dev. Bank of Puerto Rico, 27 F.3d 746, 748 (1st Cir.1994); LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 841 (1st Cir.1993), cert. denied, 511 U.S. 1018, 114 S.Ct. 1398, 128 L.Ed.2d 72 (1994).

However, not all genuine issues of fact mandate trial. Only those facts that "ha[ve] the potential to change the outcome of the suit under governing law if found favorably to the nonmovant" qualify as "material" for purposes of the rule. Martinez v. Colon, 54 F.3d 980, 984 (1st Cir.) cert. den., 516 U.S. 987, 116 S.Ct. 515, 133 L.Ed.2d 423 (1995). See also,

Rogan, 267 F.3d at 27; Morrissey v. Boston Five Cents Sav. Bank, 54 F.3d 27, 31 (1st Cir.1995).

Summary judgment has been held appropriate "[e]ven in employment discrimination cases where elusive concepts such as motive or intent are at issue... if the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." Feliciano v. El Conquistador, 218 F.3d 1, 5 (1st Cir.2000) (citing Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir.1990)) (internal quotations omitted); Santiago-Ramos v. Centennial P.R. Wireless, Corp., 217 F.3d 46, 56 (1st Cir.2000); Carmona Rios v. Aramark Corp., 139 F.Supp.2d 210, 214 (D.P.R.2001).

In cases where the non-movant party bears the ultimate burden of proof, he must present definite and competent evidence to rebut a motion for summary judgment, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-257, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Navarro v. Pfizer Corp., 261 F.3d 90, 94 (1st Cir.2001); Grant's Dairy v. Comm'r of Maine Dep't of Agric., 232 F.3d 8, 14 (1st Cir.2000).

In ruling on summary judgment petitions the court will examine the evidence in the light most favorable to the opposing party drawing all inferences in its favor. Feliciano v. El Conquistador, 218 F.3d at 5; Mulero-Rodriguez v. Ponte, Inc., 98 F.3d 670, 672 (1st Cir.1996).

## IV. TITLE VII

In challenging BAXTER's decision not to implement the early retirement point system in Puerto Rico plaintiffs have

asserted discrimination claims under both disparate treatment and disparate impact theories.

[1] Art. 703 of Title VII of the 1964 Civil Rights Act, as amended, makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race... or national origin". 42 U.S.C. § 2000e-2(a)(1). This discrimination provision extends to fringe benefits afforded employees such as retirement plans. Arizona Governing Comm. v. Norris, 463 U.S. 1073, 103 S.Ct. 3492, 77 L.Ed.2d 1236 (1983).

## A. DISPARATE TREATMENT

Absent direct evidence of discrimination plaintiffs must follow the burden-shifting framework established in McDonnell Douglas v. Green, 411 U.S. 792, 802-5, 93 S.Ct. 1817, 1824-26, 36 L.Ed.2d 668, 677-79 (1973). Rivera-Rodriguez v. Frito Lay Snacks Caribbean, 265 F.3d 15, 25 (1st Cir.2001); Feliciano v. El Conquistador, 218 F.3d at 5.

Under the McDonnell Douglas paradigm plaintiff carries the initial burden of establishing discrimination based on national origin by presenting evidence sufficient to constitute a prima facie case of discrimination. "As in other types of disparate treatment cases an employee establishes a prima facie case of benefit discrimination by following the McDonnell Douglas framework and showing that he or she is a member of a protected group, was eligible to receive a benefit, was denied a benefit, and non-protected group members received the benefit." 1 Lex K. Larson, Employment Discrimination § 14.01, pp. 14-2 to 14-3 (2d Ed.1994).

Thus, plaintiffs must submit evidence that "other similarly situated employees who were not members of the protected class were treated more favorably." Rivera-Rodriguez v. Frito Lay, 265 F.3d at 25; Rivas v. Radio Shack, Inc., 312 F.3d 532, 534 (1st Cir.2002). See also, Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 71, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977) ( "[S]imilarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin."); Conward v. Cambridge Sch. Comm., 171 F.3d 12, 20-22 (1st Cir.1999) (plaintiff must show that others similarly situated to him "in all relevant respects" were treated differently by the employer); Perkins v. Brigham & Women's Hosp., 78 F.3d 747, 751 (1st Cir.1996) (plaintiff must "demonstrate that the cases are 'fair congeners' "); Bush v. Commonwealth Edison Co., 990 F.2d 928, 931 (7th Cir.1993) cert. den., 511 U.S. 1071, 114 S.Ct. 1648, 128 L.Ed.2d 367 (1994) (no prima facie disparate treatment case where non-protected class comparators treated both better and worse than plaintiffs).

Once plaintiff has complied with this initial step the defendant must "articulate a legitimate nondiscriminatory reason" for the challenged conduct at which time presumption of discrimination fades. The burden then falls back on plaintiff who must then demonstrate that the proffered reason was a "pretext" and that the decision at issue was instead motivated by discriminatory animus. See, Gu v. Boston Police Dept., 312 F.3d 6, 11 (1st Cir.2002); Gonzalez v. El Dia, Inc., 304 F.3d 63, 69 (1st Cir.2002); Zapata-Matos v. Reckitt & Colman, Inc., 277 F.3d 40, 44-45 (1st Cir.2002); Feliciano v. El Conquistador, 218 F.3d at 5; Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 54 (1st Cir.2000). "At this third step in the burden-shifting analysis, the McDonnell

Douglas framework falls by the wayside because the plaintiff's burden of producing evidence to rebut the employer's stated reason for its employment action merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." Feliciano v. El Conquistador, 218 F.3d at 6 (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)) (internal citations and quotation marks omitted).

Defendant's "burden is one of production, not persuasion" Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 142, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) and "[a]t all times, the plaintiff bears the 'ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff.' " Gu v. Boston Police Dept., 312 F.3d at 11 (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 253, 101 S.Ct. 1089). See also, Reeves, 530 U.S. at 143, 120 S.Ct. 2097.

[2][3] Title VII "does not ensure against inaccuracy by an employer, only against... discrimination." Rivas Rosado, 312 F.3d at 535. "Federal courts do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers [Title VII] does not interfere." Gonzalez v. El Dia, Inc., 304 at 69 (citation and internal quotation marks omitted); Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 20 (1st Cir.1999) (courts may not act as super personnel departments reviewing the "merits", "rationality" or accuracy of the defendant's determinations).

The fact that the reasons proffered by the employer are

discredited by plaintiff does not automatically mandate a finding of discrimination. "That is because the ultimate question is not whether the explanation was false, but whether discrimination was the **cause** of the [conduct at issue]. We have adhered to a case by case weighing. Nonetheless, disbelief of the reason may, along with the prima facie case, on appropriate facts, permit the trier of fact to conclude the employer had discriminated." Zapata, 277 F.3d at 45 (citations omitted) (emphasis ours); Reeves, 530 U.S. at 147-48, 120 S.Ct. 2097.

In a summary judgment context the court must determine "whether plaintiff has produced sufficient evidence that he was discriminated against due to his national origin to raise a genuine issue of material fact." Zapata, 277 F.3d at 45; Rivas Rosado, 312 F.3d at 534.

[4] Thus, in Title VII cases summary judgment petitions will be denied if once the court has reviewed the evidence submitted by the parties in the light most favorable to the plaintiff it finds there is sufficient evidence from which a trier of fact could conclude that the reasons adduced for the charged conduct are pretextual and that the true motive was discriminatory. Santiago-Ramos v. Centennial, 217 F.3d at 57; Rodriguez-Cuervos, 181 F.3d at 20.

**1. Prima Facie Case**

BAXTER initially argues plaintiffs' prima facie burden fails because they have not shown that they were treated differently than similarly-situated BAXTER employees not of Puerto Rican origin. In support of this argument defendant

contends that plaintiffs compare themselves to only a segment of other BAXTER employees, i.e., those covered by the **Domestic Plan** whereas other facilities located in the United States are also excluded from such Plan and likewise do not benefit from the ER/PS.

According to BAXTER the **Domestic Plan** covers many but not all of the employees of its subsidiaries in the continental United States. (FN2) Inasmuch as for purposes of this Order we will assume that plaintiffs have met their prima facie burden we need not delve into whether or not the discrepancy between the number of stateside employees excluded from the ER/PS is significant enough to defeat plaintiffs' initial step in the McDonnell Douglas analysis.

Defendant further denies discrimination arguing that eligibility for ER/PS benefits is not contingent on national origin but rather on whether an employee works for a subsidiary covered by a **Domestic Plan**. However, because we are dealing with BAXTER's determination not to extend benefits to a particular group of employees the issue is not whether there are any discriminatory effects in the application of a particular plan. Rather, the controversy centers on whether the reasons behind this decision were discriminatory.

**2. Legitimate Non-Discriminatory Reasons/Pretext**

[5] Assuming, arguendo, that plaintiffs have met their initial burden of presenting a prima facie case of discrimination based on national origin, i.e., that they are Puerto Ricans eligible for the early retirement point system, which benefits were denied to them but extended to non-Puerto Rican employees, we must then examine whether BAXTER has

articulated legitimate, non-discriminatory reasons for not adopting the ER/PS for the **Puerto Rico Plan**.

BAXTER avers its decision not to extend the ER/PS benefits to the Puerto Rico Plan responded to economic factors. Further, it claims that the pension benefits provided to plaintiffs herein were comparable or better than those offered by similar industries operating locally. Plaintiffs, on the other hand, contend these justifications are pretextual and that BAXTER's refusal to include the ER/PS in the Puerto Rico Plan was motivated instead by its discriminatory animus against Puerto Ricans.

For easier reading plaintiffs' arguments regarding pretext shall be addressed concurrently with the explanations proffered by BAXTER.

[6] It is important to note initially that Title VII does not require that all employees receive the same salaries and benefits regardless of location. Variances are authorized so long as they are not premised on impermissible factors. Thus, the statute allows for employers to "apply different standards of compensation, or different terms, conditions, or privileges of employment... to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin" 42 U.S.C. § 2000e-2(h).

According to MARY BARKER, former Vice-President for Benefit Management of BAXTER INTERNATIONAL, BAXTER provides different compensation and benefit programs to their employees without any effort to match them "either in the U.S., or globally" and its determination is a

"function of cost and competitive market conditions." BARKER Aff. ¶ 2. Puerto Rico is no exception. MS. BARKER further stated that the compensation package and benefits offered to BAXTER employees in Puerto Rico, "is tied to the [local] business environment and competitive market conditions" which, in some situations may work to their advantage but not always. BARKER Aff. ¶ 2 & 3; and affidavit of ROBERTO PEREZ, (FN3) ¶ 3. "Some benefits are better in Puerto Rico, and some are better at other locations." PEREZ Aff. ¶ 4. For instance, MS. BARKER pointed out that "as compared with many other Baxter locations in the U.S., Baxter-PR provides enhanced benefits including medical insurance (earlier eligibility and more generous co-pay and 'out-of-pocket' rules); education program (higher reimbursement rate); life insurance (two times base pay versus one time base pay in the U.S.) and a Christmas bonus (2% of pay). In addition, several Baxter-PR plants provide a greater number of vacation days than Baxter locations in the U.S." BARKER Aff. ¶ 3

**3. Economic Reasons**

In its motion for summary judgment BAXTER essentially advanced two reasons in support of its decision not to adopt the ER/PS for the **Puerto Rico Plan**. It believed that: (1) it could not afford to provide the enhanced benefits, and (2) it did not need to provide the benefits to be competitive with other similar employers in Puerto Rico.

BAXTER's refusal to extend the ER/PS to the **Puerto Rico Plan** was not a one-time decision. Improvements to the terms of the Puerto Rico pension plan was a recurrent issue that was periodically considered by BAXTER's senior management

throughout a period of several years. Therefore, this determination must be examined in the context of the sequence of events commencing in **1989** when the change of benefits was initially entertained; implementation of the ER/PS in the **Domestic Plan in 1990**, and senior management's **1993** and **1995** subsequent determinations not to adopt the ER/PS for Puerto Rico.

**a) Benefits Prior to 1990**

Except for a three-year period, i.e., **1987-1990**, the benefits afforded the BAXTER-PR employees have differed from those offered to stateside employees. To this effect GREGORY HANSEN points out in his affidavit that "[t]he Puerto Rico Plan and its predecessors historically have had different provisions, formulas and employee payouts than the Domestic Plan. In 1987, however, the Puerto Rico Plan was greatly enriched so as to match the domestic Plan general retirement payout." HANSEN Aff. ¶ 4.

According to the documentary evidence on record the initial discussions regarding extending the proposed amendments to Puerto Rico employees centered on three subjects, i.e., (1) "discrimination testing", (2) need for additional time to "implement and communicate" any changes, and (3) conducting a study to assess the added costs to the pension plan.

The Minutes of the **June 28, 1989** Retirement System Administrative Task Force Meeting summarize the aforementioned points as follows:

PUERTO RICO PENSION: Greg Hansen commented on the

effect of delaying changes to the Puerto Rico Pension Plan and what, if any, impact that approach may have on **discrimination testing** of the Plans.

Judy Coffey-Hedquist explained that, from a timing perspective, it would not be possible to **implement and communicate** changes to the Puerto Rico Plan by January 1, 1990.

Herb Walker pointed out that it would also be prudent to defer implementation so that **results** of several employee **surveys** on compensation and benefits currently distributed to Puerto Rico employees become available. (emphasis ours)

**(1) Discrimination Testing**

Plaintiffs argue the phrase "discrimination testing" used during this initial phase corroborates their allegations of national origin discriminatory animus. Plaintiffs reject HANSEN's explanation of the term within the actuarial field as "highly questionable" in the context of this case. Plaintiffs' Motion and Memorandum in Opposition (docket No. 43) p.17 n4.

In his deposition MR. HANSEN explained that the term "discrimination" in the aforementioned process did not refer to the protections afforded by Title VII. Rather, it alludes to ERISA's provision that "contributions or benefits provided under the plan do not **discriminate in favor of highly compensated employees**". 26 U.S.C. § 401(a)(4). (emphasis ours).

It was MR. HANSEN, an actuary, who initially raised

this matter at the Task Force meeting and actively pursued the topic always in the actuarial context of "discrimination testing of the plans". See, i.e., **June 7, 1989** HANSEN memorandum re: Task force Meeting ("I [HANSEN] brought up the subject of the Puerto Rico plan and whether comperable [sic] changes will be made. We discussed discrimination issues briefly." (emphasis ours)) and **June 27, 1989** memorandum to file by HANSEN re: June 22, 1989 meeting ("We will check on whether the implementation of the plan can be delayed 6 months for Puerto Rico for **discrimination testing** purposes." (emphasis ours)).

Additionally, the December 5, 1990 Minutes of the Administrative Committee for the Baxter International Inc. Employee Benefits Plans specifically addressed the "**Discrimination Test**" in that same context and add further support to MR. HANSEN's version. In pertinent part the minutes read:

> II. **IIP Discrimination Test**
>
> [D]istributed and reviewed the summary of the preliminary 1990 IIP**discrimination test** and related census data... [A]lso reviewed the results... of restructuring the IIP participants into various employee groups and testing the groups separately. Because the preliminary restructuring does not eliminate the anticipated need to refund employee contributions, Ms. Wescott stated that her staff is attempting to restructure IIP participants by division, although preliminary results with this approach are not encouraging.
>
> (emphasis ours)

Based on the foregoing, we see no grounds to discredit MR. HANSEN's version of the term to make it coincide with plaintiffs' national origin based discrimination.

(2) Time to Implement and Communicate

Plaintiffs discard as pretextual BAXTER's allegations of the need for more time before deciding whether or not to implement the ER/PS benefits to Puerto Rico. Plaintiffs cite the alleged need for additional time to "translate" as exorbitant ergo pretextual by pointing to a **June 7, 1989** memorandum regarding a Task Force Meeting wherein HANSEN wrote: "Baxter thinks they might want to at least delay 6 months and maybe a year before the Puerto Rican plan is installed because there wouldn't be enough time to **translate and communicate** the information." (emphasis ours). However, the Minutes of the **June 28, 1989** Retirement System Administrative Task Force Meeting refer to "**implement and communicate**" instead and we see no reason to mistrust this version.

Further, according to the record additional considerations had to be taken into account by BAXTER in making this decision particularly its economic impact. Given the size of its local operations as well as the effects on its competitive posture the need for additional time to analyze this matter does not appear necessarily, if at all, consistent with being pretextual.

(3) Competitiveness

Ever since **1989** BAXTER was consistently concerned with the added costs inherent in implementing the ER/PS to its Puerto Rico business. References to "competitiveness" (FN4)

also emerge regularly. It appears recorded in the Minutes of a **December 5, 1990** Meeting of the Administrative Committee for the Baxter International Inc. Employee Benefit Plans which, in pertinent part reads as follows:

IX. Puerto Rico

Mr. Walker informed the Committee that there has been discussion in Puerto Rico relating to amending the Puerto Rico Pension Plan to include a 65-85 point system and offering a 401(k) plan, similar to the plans in the U.S. Mr. Walker said that an analysis of the **competitiveness** of the Company's plans in Puerto Rico will be made.

(emphasis ours).

Additionally, the **March 8, 1991** Minutes of Meeting of the Administrative Committee for the Baxter International Inc. Employee Benefit Plans indicate:

VI. U.S./Puerto Rico Pension Plan

Mr. Kunz distributed and reviewed the material... which summarizes the adverse effect on transferred Company employees who cease participation in either the U.S. or Puerto Rico pension plan and begin participation in the other as a result of the transfer.... Mr. Walker stated that a study of the **competitiveness** of the Company's Puerto Rico plans is underway to determine whether any plan changes should be considered. (Emphasis ours).

See also, **June 7, 1989** memorandum from HANSEN re: Task Force Meeting ("We are to (at our leisure) develop the

cost to the pension plan of the new provisions. There is no retiree medical in Puerto Rico." (emphasis ours)); **June 29, 1989** memorandum from HANSEN re: Implementation Task Force Meeting (A survey is being conducted on compensation and benefits in Puerto Rico. It was decided not to extend the new early retirement or death benefit provisions to the Puerto Rico plan currently. (emphasis ours)); Minutes of **December 5, 1990** Meeting of the Administrative Committee for the Baxter International, Inc. Employee Benefit Plans ("Mr. Walker informed the Committee that there has been discussion in Puerto Rico relating to amending the Puerto Rico Pension Plan to include a 65-85 point system and offering a 401(k) plan, similar to the plans in the U.S. Mr. Walker said that an analysis of the **competitiveness** of the Company's plans in Puerto Rico will be made." (emphasis ours)).

Plaintiffs attempt to discredit this argument by alleging that none of the plaintiffs were aware of any surveys being conducted nor have any such results been provided by BAXTER. However, the fact that plaintiffs in this particular action did not personally know of any such surveys nor advised of the results is not indicative that none were carried out. Nor can we find that references to surveys were pretextual given BAXTER's repeated references to competitiveness and the related studies carried out in **1993** and **1995**.

**b) Studies**

Plaintiffs point to the results of studies of BAXTER-PR compensation and benefits commissioned by BAXTER in **1993** and **1995** as additional evidence of pretext arguing that they belie defendant's arguments regarding competitiveness in the local ambit.

**(1) 1993 Study**

In support of their pretext allegations plaintiffs point to the fact that the Puerto Rico Employee Benefits Task Force designated in 1993 (FN5) concluded that "conceptually all [were] in favor of [instituting] early retirement point system" and that the focus groups interviewed by a private researcher opined that BAXTER was "below the market in salary and benefits." However, the findings of the Total Compensation Study carried out established that "[o]verall, Baxter's base salaries in Puerto Rico are 93% of the comparator group... [and][b]enefits are **generally competitive**." (Emphasis ours).

According to the 1993 study--based on a 100 median--the "total benefits" provided by BAXTER were 88% whereas the "pension" plan stood at121%. Thus, even though **total benefits** fell below (FN6) the median the **pension** plan was **above** it.

Plaintiffs also attempt to discredit the explanations proffered by MARY BARKER for BAXTER's senior management's decision to only implement the medical plan changes in **1993** alleging a discrepancy between her **June 1, 1994** memorandum on this subject and the reasons advanced by ROBERTO PEREZ in his affidavit submitted in support of BAXTER's motion for summary judgment.

In his sworn statement ROBERTO PEREZ proffered two grounds for the rejection of the ER/PS implementation, i.e., "(1) Baxter's stock was doing poorly; and (2) Baxter senior management was not convinced that Baxter plants in Puerto Rico were not competitive with other Puerto Rico manufacturers with respect to compensation and benefits."

(FN7) PEREZ Aff. ¶ 6.

MS. BARKER's **June 1, 1994** memorandum regarding "Concerns about Puerto Rico Benefit Plans" highlights the expectations created among the local employees concerning retirement plans generated by the inquires carried out in **1993**. The memorandum specifically concedes that after "[e]xtensive benchmarking and survey work... done to see how our benefits and compensation compared to other companies in Puerto Rico [ ][w]e satisfied ourselves that even without the 165E Plan, we were very competitive with other companies."

In the aforementioned memorandum MS. BARKER further explains the reasons for senior management declining to extend the ER/PS as follows:

Because of concerns about developing medical trends, tax law changes and business pressures, the decision was made to change medical benefit plan levels and not to change, add or improve, the pension plans.

. . . . . .

The Tax Department has alerted us to the sensitives around any increase in benefit plans in Puerto Rico due to our current deductivity levels.

Plaintiffs rebuff BAXTER's proffered economic arguments as pretextual citing to the savings brought about by the Task Force's proposed modifications to the medical plan. However, at the time these represented potential, not concrete savings. In her deposition MS. BARKER further expounded on the reasons for only implementing the medical benefit plan

changes and not the ER/PS as follows:

There was concern about the cost of implementing the changes. There were concerns that the cost savings on the medical plan might not materialize. There was concern because of the business conditions at the time.

When asked during her deposition to explain what she meant by "business conditions" MS. BARKER responded:

[T]here was a discussion of the fact that our stock price was not doing very well at that particular time. There were concerns over the uncertainty of certain tax changes which were... being discussed in Puerto Rico at that time, which could potentially impact the business, and there was uncertainty around that and did not seem to be any clear... answers to that question.

I believe that there was some discussion about the overall cost competitiveness of Puerto Rico, in comparison to other operations around the world, and making sure that it was cost-competitive.

BARKER Depo. p. 72-3.

Plaintiffs argue that the fact that MS. BARKER did not specifically mention "stock prices" in her **1994** memorandum somehow renders the version in the affidavit of ROBERTO PEREZ untrue.

We do not find that the additional reasons included in MS. BARKER's **1994** memorandum and subsequently expounded in her deposition are at odds with those advanced by ROBERTO PEREZ particularly when his three-page

declaration merely provides a succinct account of BAXTER's economic motivations.

Further, MS. BARKER's **1994** memorandum does make reference to the two points cited by MR. PEREZ. First, it alludes to the **1993** study and its findings to the effect that the benefits offered to the BAXTER-PR employees were comparable to those provided at the time by the other local industries. Further, the term "business pressures" in the context of her memorandum is consonant with the decrease in stock value in **1993**.

In refuting BAXTER's argument regarding the decline in stock value as a valid argument plaintiffs point to the 1994 Annual Report to Stockholders which although confirming a drop in stock value for **1993** also reflects gains both in the preceding and subsequent years, i.e., **1992 and 1994.** Further, the Report accounts for the **1993** loss as "primarily reflect[ing] the provisions for restructuring and litigations charges" which, plaintiffs argue, was temporary and attributable to "extraordinary" and "foreseeable" circumstances.

However, the fact that the stock value may have improved the following year does not detract from the uncontested fact that in **1993**, the critical period for purposes of its decision, BAXTER experienced serious losses. Further, it is a safe argument to say that the future activity of any stock is not a foreseeable event.

**(2) 1995 Study**

In **1994** the Puerto Rico Advisory Council was established to, among other matters, evaluate and make

recommendations regarding BAXTER-PR employee benefits. (FN8) The Council in turn appointed a committee (Puerto Rico Benefit Revision Committee) to propose changes to the pension plan and evaluate alternatives for financing those changes.

The Council, as well as ROBERTO PEREZ advocated for extending the ER/PS. In his deposition ROBERTO PEREZ justified his position as "the fair thing to do" but acknowledged that "because of the cost implications" implementation was unlikely.

MARY BARKER testified in her deposition that she personally favored the ER/PS for Puerto Rico and initially endorsed it but subsequently changed her opinion due to the "substantial increase in cost" since the **1993** study [BARKER depo. pp. 156-7] which she also described as "significant costs". BAKER depo. p. 158. MS. BARKER's reasons for changing her mind were further explained during her deposition as follows:

Because I think market dynamics have [sic] changed in the interim, and I think that the market moved very much towards more of a 165(e) type of plan. It became apparent to me from the studies that we saw that, without a 165(e), it was going to be difficult for us to attract talent on the island going forward.

The cost impact of the pension point system, when we got these numbers in 1995, the evaluation, in my mind, was a very different evaluation than it had been in 1993.

BARKER depo. p. 159.

Plaintiffs refer to a Total Compensation Study carried out in 1995 for the proposition that in that year "Baxter was worse [than in 1993] in terms in competitive posture" because according to the study "on total compensation (all pay components) Baxter was 23.3% below the 50th percentile." > (FN9) Plaintiffs' Motion and Memorandum in Opposition (docket No. 43) p.11. However, as defendant correctly points out, for purposes of our analysis, the relevant inquiry is not total compensation comparison but the terms of the pension plan which, according to the 1995 study, was 111.5% of a 100 median, i.e.: still above the median.

**c) Carolina Plant Closing**

In **October 1995** BAXTER announced the closing of the Carolina plant, one of its largest plants in Puerto Rico. The closing was programmed to be carried out in stages over a period of various years commencing in **January 1996** and ending in **December 1998.**

During this time employees from the Carolina facility urged BAXTER to enhance their retirement benefits and extend the ER/PS to the **Puerto Rico Plan**. In response to this petition in **February 11, 1997** BAXTER sent a letter signed by MIKE TUCKER, Senior Vice President of Human Resources explaining the reasons for BAXTER's position. This correspondence related the evolution of the early retirement benefits under the Puerto Rico Plan which MR. TUCKER summarized as follows:

> In 1987 Baxter established a subsidy of early retirement. This subsidy provides a higher monthly benefit to the employees who start to

> receive the benefits before 65 years of age, have at least 10 years of service and are at least 55 years of age when they terminate their employment with Baxter. The age of 55 was chosen because it was the earliest age in which an employee could start receiving the benefits under the plan. Many pension plans do not offer this subsidy for early retirement. However, Baxter acknowledges that people who terminate their employment at 55 or more could have difficulty in obtaining other employment than persons who are younger than 55... Baxter has chosen the age of 55 and 10 years of service as the separation point for the additional subsidy for early retirement in Puerto Rico.

The letter also included the reasons why the amendments requested by the employees were not viable. Again, cost implications were the determining factor for declining the employees' petition. According to the letter the total cost of benefits in Puerto Rico represented 28% of the payroll and any increase thereto would have raised manufacturing costs and render product prices non-competitive.

The added costs to the pension plan were delineated as follows:

> [A] pension plan based on a point system has an additional cost of 3 million dollars per year, thus increasing the cost of benefits in Puerto Rico to 31% of the payroll. The creation of a subsidy for employees younger than 55 years of

age would duplicate the additional cost for a point system.

In 1998 BAXTER implemented a defined contribution pension plan. According to PEREZ, as evidence of the ongoing benefits review process, "[i]n 1998, in order to stay competitive in Puerto Rico, Baxter did decide to implement one of the other proposals that had been made in Puerto Rico over the years, a defined contribution pension plan." Aff. ¶ 8 (emphasis in original).

**4. Tradeoffs**

Plaintiffs contend that the fact that the ER/PS was not extended to BAXTER-PR employees despite their implementation of significant cost-saving measures such as the medical and cafeteria plans represents additional evidence of pretext. Plaintiffs also point to the fact that the total cost of benefits in Puerto Rico is 28% of the payroll whereas it is 30% in the United States.

However, the results of the **1993** and **1995** studies as well as the analysis provided in the **1997** letter remain undisturbed and provide ample support for BAXTER's decision based on competitiveness both (1) relative to the other local employers as well as (2) maintaining a level of cost-competitive products.

**5. Perception Second-class Status**

Plaintiffs argue that the references made by ROBERTO PEREZ and MARY BARKER that the local employees held "second-class status" insofar as benefits was concerned because

of the fact that their repeated requests and efforts to have their pension plan improved so as to be on a par with **Domestic Plan** benefits went unanswered is indicative of national origin discriminatory animus. However, according to the record this was the perception held by the local employees. There is no evidence that this was also the opinion of the BAXTER decision-making authority which is the proper standard for substantiating discrimination claims. See, Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 41 (1st Cir.2001) (appropriate inquiry is what the principal decision maker's "perception" of the events was, i.e., that he "reasonably believed " the correctness of the reasons proffered). See also, Shorette v. Rite Aid of Maine, Inc., 155 F.3d 8, 15 (1st Cir.1998) (plaintiff's own perception not probative of discrimination but rather employer's perception).

**6. Queipo Report/Nevin Affidavit**

BAXTER has moved to strike the report of ANTONIO QUEIPO, an actuary consultant, due to plaintiffs' failure to timely disclose him and also claiming the report is unreliable. > (FN10) However, inasmuch as we have not relied on his conclusions in reaching our decision today we need not address the merits of the request.

As additional evidence of national origin discrimination plaintiffs submitted the affidavit of HILDA NEVIN, a retired BAXTER employee, who transferred from Puerto Rico to Illinois in the early **1980s**. In her declaration MS. NEVIN complained of the disparaging treatment given to her in Illinois which she perceived was due to her national origin. MS. NEVIN further claimed BAXTER refused to include her in the **Domestic Plan** after she transferred or to credit her Puerto Rico

service years which contrasted with the benefits afforded her non-Puerto Rican husband who had begun his employment with Baxter in Mexico and was covered by the **Domestic Plan** regardless of location of employment.

Defendant has objected to this evidence as irrelevant. Not only did MS. NEVIN cease working for BAXTER in **1987**. that is three years prior to the adoption of the ER/PS but she was paid a lump-sum pension benefit under the **Domestic Plan** in **1986**.

Therefore, we will not consider the allegations contained in her declaration in reaching our decision in this case.

## 7. Conclusion

The scope of our probe into BAXTER's determination is constrained by Title VII considerations and therefore, directed exclusively to discriminatory motivation. According to case law, BAXTER's business decisions regarding ER/PS are not reviewed for accuracy or fairness nor are we to examine if they are rational or mistaken.

Further, discrediting the reasons proffered by BAXTER by itself does not automatically establish disparate treatment discrimination under Title VII. Plaintiffs must also produce sufficient credible evidence of motive to effectively oppose defendants' summary judgment motion.

After all the dust has settled and at the end of the day what are we left with to consider as evidence of national origin discrimination? We find that plaintiffs' attempts to undermine

the reasons proffered by BAXTER fail to create a genuine issue of material fact regarding origin-based discrimination in a disparate treatment setting. According to the studies carried out in **1993** and **1995** pension benefits offered to BAXTER-PR employees were comparable to those available to similar industries operating locally. Additionally, the cost impact of the added benefits over the product price presented further justification of its business decision.

Therefore, we find no material challenge to the reasons proffered by BAXTER for its decision nor evidence of discriminatory animus. According to the record, BAXTER's market-based rationale for its decision was not a pretext for national origin discrimination

We are not here to judge whether BAXTER's determination was good or bad or whether it was "the fair thing to do" under the circumstances. The court empathizes with plaintiffs' situation after rendering many years of services but it is bound to adhere to the law and the legal standard required to establish disparate discriminatory treatment.

## B. DISPARATE IMPACT

[7] Title VII disallows "both 'overt discrimination' in the form of disparate treatment... and more subtle forms of discrimination, known as disparate impact discrimination, arising from ' the consequences of employment practices, not simply the motivation.' " E.E.O.C. v. Steamship Clerk's Union, 48 F.3d 594, 601 (1st Cir.1995) cert. den., 516 U.S. 814, 116 S.Ct. 65, 133 L.Ed.2d 27 (citing Griggs v. Duke Power Co., 401 U.S. 424, 431-32, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)).

[8] Disparate impact under Title VII outlaws "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) cited with approval in Hazen Paper Co. v. Biggins, 507 U.S. 604, 609, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993). See also, Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 986-7, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988); Bramble v. Am. Postal Workers Union, 135 F.3d 21, 26 (1st Cir.1998).

[9] Disparate treatment is used in situations where an employee is treated less favorably because of an impermissible factor whereas disparate impact occurs when a neutral employment practice has an adverse impact on a protected class. Hazen Paper Co., 507 U.S. at 609, 113 S.Ct. 1701; Int'l Bhd. of Teamsters, 431 U.S. at 335 n. 15, 97 S.Ct. 1843.

The linchpin of a disparate treatment claim is proof of the employer's discriminatory motive. Not so a claim of disparate impact: that type of claim is predicated not on proof of intentional discrimination, but, rather, on proof that the employer utilizes employment practices that are facially neutral in their treatment of different groups but... in fact fall more harshly on one group than another and cannot be justified by business necessity.

Mullin v. Raytheon Co., 164 F.3d 696, 699-700 (1st Cir.1999) (citations and internal quotation marks omitted).

[10][11][12][13] Thus, disparate treatment rests on discriminatory intent and motive whereas disparate impact is

premised on the discriminatory results instead. Int'l Bhd. of Teamsters, 431 U.S. at 335 n. 15, 97 S.Ct. 1843 (proof of discriminatory intent "critical" for disparate treatment cases but not required to establish disparate impact.) Discrimination "is not always a function of a pernicious motive or malign intent" but may be the consequence of neutral policies and practices that unduly prejudice employees falling within the protected categories established in Title VII. E.E.O.C. v. Steamship Clerks Union, 48 F.3d at 601. "[T]he necessary premise of disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." Watson v. Fort Worth Bank and Trust, 487 U.S. at 987, 108 S.Ct. 2777. "In all events, however, a defendant's good faith is not a defense to a disparate impact claim." E.E.O.C. v. Steamship, 48 F.3d at 602.

[14] Plaintiff carries the initial burden of establishing the three elements required for a prima facie case under the disparate impact theory, i.e., "identification, impact, and causation." E.E.O.C. v. Steamship, 48 F.3d at 601. Accordingly, plaintiff must (1) specify the particular policy or practice under attack and how it has been utilized by the employer; (2)show a dissimilar effect on individuals covered by Title VII, and (3) establish a causal relationship between both. Once plaintiff has met this initial burden the onus falls upon the defendant to either challenge any of the elements of the prima facie case or "show... that the challenged practice is job-related and consistent with business necessity." Id. at 602. See also, Donnelly v. Rhode Island Bd. of Governors, 110 F.3d 2, 5 n. 2 (1st Cir.1997) (plaintiff carries initial burden to establish "adverseness and disparateness", i.e., plaintiff adversely and disproportionately affected when compared to

non-protected employees)

In establishing causal relationship plaintiff must show that the differences come as a result of the policy at issue and not other unrelated causes. In Donnelly the court held that plaintiffs failed to make out a prima facie case absent evidence that "similarly situated males were better paid" since the disparity in compensatory scheme was due to the female professors' choice of academic field and market forces not their sex. Id. at 5

Consistent with plaintiff's burden of disparate impact "[i]f the defendant fails in its efforts to counter the plaintiff's prima facie case, then the factfinder is entitled--though not necessarily compelled--to enter judgment for the plaintiff. On the other hand, even if the defendant stalemates the prima facie case by elucidating a legitimate, nondiscriminatory rationale for utilizing the challenged practice, the plaintiff may still prevail if [he] is able to establish that the professed rationale is pretextual. The plaintiff might demonstrate, for example, that some other practice, without a similarly undesirable side effect, was available and would have served the defendant's legitimate interest equally well. Such an exhibition constitutes competent evidence that the defendant was using the interdicted practice merely as a pretext for discrimination." E.E.O.C. v. Steamship, 48 F.3d at 602 (citations and internal quotation marks omitted).

The factors necessary for upholding a "business necessity" defense are far from clear. See, id. at 607 ("the meaning and scope of the 'business necessity' concept are blurred at the edges.")

The disparate impact theory originated in Griggs v.

Duke Power Co., where the Supreme Court struck down a facially neutral test that operated to disproportionately exclude blacks [African American] from employment but did not measure skills related to those jobs. In so ruling the court determined that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity." Id. at 431, 91 S.Ct. 849.

Subsequent jurisprudence construed the "business necessity" narrowly and required that "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge." Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977); see also, Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

The Supreme Court moved away from its previous strict business necessity stance in disparate impact cases by ruling that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster". Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 659, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). Further, defendant's burden was made easier by extending the disparate treatment allocation of proof mechanism to disparate impact cases. "In this phase the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff... [t]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." Id. 490 U.S. at 659, 109 S.Ct. 2115 (internal citations and quotation marks omitted, italics in

original).

As a reaction to this new approach--which made plaintiff's onus more taxing--Congress codified the disparate impact standard in the amendments to the Civil Rights Act of 1991 to reinstate the stricter "business necessity" and "job relatedness" assay provided for in Griggs v. Duke Power and other pre Wards Cove decisions. (FN11)

The disparate impact standard now appears at 42 U.S.C. § 2002e-2(k) and provides.

(1)(A) An unlawful employment practice based on disparate impact is established... only if -

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race... or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party... demonstrat[es] ... an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

Even though disparate impact has been used to establish claims alleging discrimination in benefits its application is quite uncommon essentially because this doctrine "developed out of the language in section 703(a)(2) [42 U.S.C. § 2000e-2(a)(2)] prohibiting discrimination based on deprivation of employment opportunities, such as the opportunity to be

hired or promoted." Garcia v. Spun Steak Co., 998 F.2d 1480, 1485 (9th Cir.1993) cert. den., 512 U.S. 1228, 114 S.Ct. 2726, 129 L.Ed.2d 849 (1994). "While the disparate impact theory is clearly available in suits alleging discriminatory denial of employment opportunities, it is not obvious that the theory applies generally to suits challenging discriminatory terms and/or conditions of employment." § 20.05 Larson at 20-15. See also, Laurie Dechery, Note, Preferential Treatment or Discriminatory Standards: Do Employer-provided Insurance Plans Violate Title VII when They Exclude Treatment for Breast Cancer?, 80 Minn. L.Rev. 945, 962 (1996) ("Courts rarely apply disparate impact analysis to alleged discrimination in benefits.")

This issue has yet to be decided by the Supreme Court. However, we find no obstacle to extending its application to the denial of benefits in appropriate cases.

The 1991 Civil Rights amendment codifying the disparate impact mechanism does not restrict in any way its application to disparate treatment cases but rather applies to "unlawful employment practice[s]" 42 U.S.C. §2000e-2(k)(1)(A). (FN12)

[15] In support of their disparate impact claim plaintiffs argue that BAXTER's decision not to implement the point system [and medical and life insurance coverage] for early retirement to workers in Puerto Rico constitutes the requisite neutral "practice or policy" having a disproportionate effect on its local Puerto Rican labor force. Specifically, they argue that "the establishment of two separate and unequal retirement compensation schemes, one of which is almost exclusively for Puerto Rican employees and is decidedly inferior as compared

to the other one which is primarily available to non-Puerto Ricans cannot be found to be anything other than a practice or policy. It treats Puerto Ricans in a disparate and less favorable manner than their non-Puerto Rican counterparts." Plaintiffs' Surreply (Docket No. 45) pp.6-7.

We find, however, this argument is misplaced and is applicable instead to a disparate treatment claim.

Plaintiffs' cause of action stems not from an apparently neutral policy of general application to all BAXTER employees which in its application has a disparate effect on employees of a particular national origin. This would be the case, for instance, of a single pension plan which consistently excluded Puerto Ricans from certain benefits awarded to similarly situated non-Puerto Ricans. The discrimination at issue in this litigation centers instead on BAXTER's conscious decision not to extend certain benefits to its Puerto Rico employees. Specifically, the allegations in the complaint arise from the purportedly disparate treatment given to BAXTER's local employees caused by defendant's determination to utilize two different pension plans--one allegedly inferior to the other. Thus, the controversy centers on the markedly different treatment given to two types of individuals, i.e., Puerto Rico employees vis à vis non-Puerto Rico employees which falls squarely under the disparate treatment analysis and not on the consequences brought about by the adoption of a particular pension plan.

Therefore, we conclude that upon review of the allegations submitted by plaintiffs it is the discriminatory treatment given by BAXTER to its Puerto Rico employees that is under attack not the discriminatory effects of the Puerto Rico

pension plan. Accordingly, the disparate impact claims are hereby DISMISSED.

## V. ERISA

[16] Plaintiffs contend BAXTER's failure to grant them the same benefits as stateside employees covered by the Domestic Plan constitutes a violation of fiduciary duties under ERISA. In pertinent part, the complaint reads:

> 27. The aforementioned policies, practices, acts and omissions of defendants.... constitute a breach of fiduciary duty because the unlawful discrimination described above exposed and exposes the Puerto Rican Plan to loss of favorable tax status and federal legal guarantees which jeopardize the stability and existence of the Puerto Rican Plan.

[17][18] Pursuant to 29 U.S.C. §1002(21)(A) "[f]iduciary duties [under ERISA]... attach to persons who exercise discretionary authority or control respecting 'management of [the] plan or... management or disposition of its assets.'" Campbell v. BankBoston, N.A., 327 F.3d. 1, 3 (1st Cir.2003). Amendments effectuated to the terms of a pension plan--even if the decision entails who will receive benefits and/or the formula for calculation of benefits--do not fall within the scope of ERISA's fiduciary obligations. Lockheed Corp. v. Spink, 517 U.S. 882, 890-91, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996); Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78, 115 S.Ct. 1223, 131 L.Ed.2d 94 (1995); Campbell v. BankBoston, N.A., 327 F.3d at 3.

Accordingly, the claim for breach of fiduciary duties under ERISA is herebyDISMISSED.

## VI. P.R. CIVIL CODE

[19] Plaintiffs having conceded that ERISA preempts their Third Claim for Relief (FN13) asserted under the provisions of the Puerto Rico Civil Code (FN14) the same is hereby DISMISSED.

## VII. CONCLUSION

Based on the foregoing the Defendants' Motion for Summary Judgment (docket No. 42) (FN15) is GRANTED and the complaint filed in this case is hereby DISMISSED.

Judgment shall be entered accordingly.

IT IS SO ORDERED.

## JUDGMENT

The Court having dismissed the complaint filed in this case through its Order issued on this date, it is hereby

ORDERED AND ADJUDGED that the complaint filed in this case be and the same is hereby DISMISSED.

IT IS SO ORDERED.

(FN1.) Among other subsidiaries excluded from the Domestic Plan are: Perfusion Services of Baxter Healthcare Corporation, Nextran, the hourly employees of American Cytoscope Makers

Division, the hourly employees of the Medi-Vac facility in Jacksonville, Texas and the former Airlife facility in Montclair, California.

(FN2.) A list of the particular subsidiaries appears at n.1 ante.

(FN3.) In his affidavit subscribed on January 22, 2000 MR. PEREZ summarized his experience with BAXTER as follows:

Until the beginning of this year, I was the President of Baxter International Inc.'s (Baxter) Fenwal division. In this position, I was ultimately responsible for the division's operations worldwide, including Fenwal's Puerto Rico operations. I worked for Baxter for over twenty-five years. Prior to 1985, I was in charge of Baxter's manufacturing operations in Puerto Rico. From July 1985 to June 1992, I was Vice-President of Baxter's Fenwal division with particular responsibility for the division's manufacturing plants in Puerto Rico. In June 1992, I became President of the Fenwal division. In March 1994, I was appointed Corporate Vice President of Manufacturing, and, as head of the Corporate Manufacturing Council, was responsible for coordinating corporate manufacturing strategy with the general managers of all Baxter units in Puerto Rico. In November 1995, I became President, Global Operations of Baxter's Renal Division. In June, 1997, I again assumed the position of President of the Fenwal division.

PEREZ Aff. ¶ 1.

(FN4.) "Competitiveness" is given two different connotations in the documents submitted in this case. On the one hand it is used to compare the benefits provided by BAXTER-PR vis à vis those provided by similar employers in Puerto Rico. It is

also used to denote a cost-competitive manufactured product.

(FN5.) The purpose of the Task Force was to: (1) review and analyze employee benefits package available at the time, (2) evaluate retirement benefits and review feasibility of implementing a 165(e) plan in 1994 and/or the ER/PS, and (3) "determine how to maximize benefits dollars with respect to island-wide competitive industries while maintaining employee satisfaction, and overall affordability (i.e. no incremental cost) to Baxter."

(FN6.) As explained by BAXTER, "[i]n both 1993 and 1995, the absence of a defined contribution (165(e)) plan dragged Baxter's 'all retirement' index down... In 1995, Baxter was the only company out of the nine studied that did not have a defined contribution plan... That study ultimately led to Baxter's decision [in 1998] to provide Baxter's Puerto Rico employees with a defined contribution plan." Defendants' Reply (docket No. 44) p.10 n.4.

(FN7.) It is important to note that the conclusion regarding competitiveness of benefits in relation to other industries is consistent with the findings of the 199? study.

(FN8.) Its responsibilities included the "[n]eed to enhance the pension plan to the domestic standard [and the] [n]eed to find avenues to finance the plan or minimize impact if enhanced".

(FN9.) Even though the study concluded that "[o]verall, employee benefits are 31.4% below the median market" as indicated at n.5 ante the lack of a defined contribution pension plan accounted for this discrepancy.

(FN10.) See. Defendants' Motion to Strike Plaintiffs' Surreply (docket No. 48)

(FN11.) For a detailed history of the 1991 amendments see, Linda Lye, Comment, Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense, 19 Berkeley J. Emp. & Lab. L. 315 (1998); Susan G. Grover, The Business Necessity Defense in Disparate Impact Discrimination Cases, 30 Ga. L.Rev. 387, 391 (1996); Brendan Sweeney, Comment, "Downsizing " the Age Discrimination in Employment Act: The Availability of Disparate Impact Liability, 41 Vill. L.Rev. 1527 (1996) and Rosemary Al necessity' concept are blurred at the edges.")

The disparate impact theory originated in Griggs v. Duke Power Co., where the Supreme Court struck down a facially neutral test that operated to disproportionately exclude blacks [African American] from employment but did not measure skills related to those jobs. In so ruling the court determined that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity." Id. at 431, 91 S.Ct. 849.

Subsequent jurisprudence construed the "business necessity" narrowly and required that "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge." Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977); see also, Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

The Supreme Court moved away from its previous strict

business necessity stance in disparate impact cases by ruling that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster". Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 659, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). Further, defendant's burden was made easier by extending the disparate treatment allocation of proof mechanism to disparate impact.

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3. U.S. Code: Title 42: Section 2000e-2

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

( c) Labor organization practices

It shall be an unlawful employment practice for a labor organization -

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or

refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 (50 U.S.C. 781 et seq.).

(g) National security

Notwithstanding any other provision of this subchapter, it

shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if -

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, **it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment** pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or **to employees who work in different locations**, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color,

religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if -

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph ( C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

( C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act (21 U.S.C. 801 et seq.) or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights

laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws -

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had -

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to -

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

( C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid

or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28.

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